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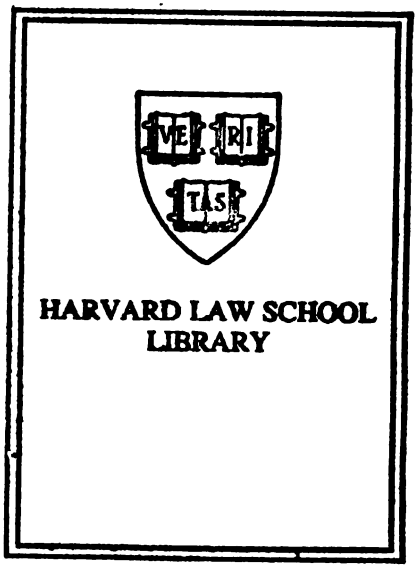

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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JULY 1 TO OCTOBER 7, 1907

HERSCHEL BOUTON LAZELL
STATE REPORTER

VOL. 149

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JUNE TERM, 1907.*

JACOBS *v.* MORGENTHALER.

1. PARTNERSHIP ASSOCIATIONS—DISTRIBUTION OF ASSETS—RIGHTS OF STOCKHOLDERS.

   The action of all but one of the stockholders of a limited partnership association in transferring certain notes belonging to the association to one of themselves, in payment of an alleged indebtedness, does not bind the nonparticipating stockholder if there was in fact no indebtedness.

2. SAME—INDEBTEDNESS—PURCHASE OF STOCK—PRESUMPTIONS.

   Where payments are shown to have been made by an individual to a limited partnership association, the absence of proof that such payments were made for the purchase of stock justifies an instruction that they made the payor a creditor of the company.

3. SAME—DISTRIBUTION OF ASSETS.

   A division of the assets of a limited partnership association among its stockholders, in proportion to the amounts paid in by them, is valid, there being no creditors, though the payments were made by the stockholders upon the understanding that they should take treasury stock for them.

4. SAME — PAYMENTS BY STOCKHOLDER — PURCHASE OF STOCK — EVIDENCE.

   Evidence examined, and *held*, to show that certain payments made by a stockholder of a limited partnership association were advancements to it and not payments on account of treasury stock purchased by him.

5. EVIDENCE—BOOKS OF ACCOUNT—ADMISSIBILITY.

   The books of a limited partnership association are not admissible to show that defendant paid money on an alleged special obligation to take treasury stock at 50 cents on the dollar, which obligation the defendant denies, and which is not otherwise proved.

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*Continued from Vol. 148.

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6. PARTNERSHIP ASSOCIATIONS—SALE OF ASSETS—DISTRIBUTION—FRAUD—EVIDENCE.

Evidence examined, and *held*, that there was an absence of proof of fraud in the sale of the property of a limited partnership association, and an arrangement to apply the notes received therefor upon the claim of a creditor stockholder.

7. SAME—RECEIVERS—CONVERSION OF ASSETS—EVIDENCE—ADMISSIBILITY.

In trover by the receiver of a limited partnership association against a stockholder for certain notes given in part payment for the property of the association, and distributed to the stockholders in payment of their claims against it, evidence is admissible to show that a sum sufficient to pay all outstanding debts of the concern, except such as were due the consenting stockholders, was set aside, and placed in the hands of the secretary for that purpose.

8. SAME.

Defendant is also entitled to show, by cross-examination of the receiver and the secretary, who is the principal creditor, that no action has been brought against other stockholders who received notes under similar circumstances.

9. SAME.

Defendant is also entitled to show the facts regarding the claim of the secretary, the principal claimant, and the conditions upon which, and the funds from which, it was to be paid.

Error to Calhoun; North, J. Submitted April 15, 1907. (Docket No. 101.) Decided July 1, 1907.

Trover by Henry F. Jacobs, receiver of the Grocers' Specialty Manufacturing Company, Limited, against Henry W. Morgenthaler. There was judgment for plaintiff, and defendant brings error. Reversed.

Moore & Moore (*R. J. Kelly*, of counsel), for appellant.

Henry F. Jacobs and *Bernard J. Onen*, for appellee.

HOOKER, J. This plaintiff is a receiver in an action brought by one Gilbert against the Grocers' Specialty Manufacturing Company, Limited, and the order appointing

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him required that company, and all of its officers, agents, and servants, to turn over to him its property. Gilbert was a stockholder and secretary of the company. There is nothing in the record showing the nature of the bill filed by him, whether as a creditor, alleging insolvency, or as a stockholder, claiming a misapplication of its proceeds. The record does conclusively show, however, that prior to the bringing of said suit, the stockholders of said company all assenting (including Gilbert), sold the business of said company to the extent of its manufacture of "Eat-a-Biscuit," to the Malta Vita Company, for $50,000 down, and a further sum of $50,000, contingent on certain prescribed results, dependent upon the purchaser's profits from the business. We discover no claim that the debts of the Grocers' Company, outside of debts owed to its several stockholders, exceeded $5,000 or $6,000, while the receiver testified that all of the claims filed with him amounted to about $6,000, and of these Mr. Gilbert's amounted to $5,207.52. According to Gilbert's testimony, $5,000 of his claim was a sum that was promised him upon the surrender of a verbal option, and was conditioned on a sale to the Malta Vita Company. He admitted that he got his salary up to June 30, 1903, which was less than two weeks before the agreement of sale to the Malta Vita Company. Gilbert signed the bill of sale to the Malta Vita Company, and, while that is not shown by the record, Gilbert's own testimony shows that he as secretary received from that company $5,000 in cash and $20,000 in notes, and that he acquiesced in the application of $4,000 to the payment of the claim of the Malta Vita Company against the Grocers' Specialty Company, and $21,000 to Mr. Wisner, for money that he claimed to have advanced to the Grocers' Specialty Company, under circumstances similar to, if not identical with, those under which Cole and the defendant claim that they advanced money, and for which all other witnesses to the transaction say that they—i. e., Cole and the defendant—were to receive the $20,000 in notes.

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We may start with the proposition, then, that all stockholders, including Gilbert, agreed to the sale, and that the only differences in their understanding are (1) whether Cole and defendant were to receive the $20,000 notes in payment of money loaned; (2) whether Gilbert was to receive $5,000 from the payment made, or from, and subject to the condition of, the deferred payment. It being clear that the parties agreed to the sale to the point mentioned, and that Gilbert aided in consummating it, and that according to his theory $20,000 in notes went to the company, it is apparent that his bill was not filed to attack the sale as a fraud upon creditors, and we must, therefore, assume that it was filed against the defendant to reach assets in his hands belonging to the company in which he claimed an interest as creditor and stockholder; and that the court appointed the receiver to take possession of the assets, to preserve them, and, incidentally, to pay all claims against the concern before otherwise disposing of the assets. If this is not the theory upon which the bill was filed, we do not know what it was.

Perhaps it is enough for the purposes of this action to know that a receiver has been given authority to take over the assets and that he has brought trover for the alleged conversion of some of them, that they were clearly the assets of the company, and recoverable by him, unless they were turned over by consent of a majority of the stockholders to be applied on a valid debt of the company, or by consent of all the stockholders, if the claim was not a valid debt for advancement, but was at the time one of several payments made by different persons upon an agreement that it should pay for treasury stock purchased. The evidence conclusively shows that at the time the contract was made with the Malta Vita Company it was agreed and understood by all of the stockholders, unless it were Gilbert, that the claims of Wisner, Cole, and Morgenthaler were advancements of cash, and debts of the concern, and should be so treated, and that the $20,000 in notes to be given to the Grocers' Company should be

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turned over to them, to be applied in payment, so far as that sum should go, and it is overwhelmingly proved that Gilbert understood and consented to this arrangement, so overwhelmingly proven, indeed, that were there opportunity we should order a new trial upon this ground. It is also conclusively shown that, whatever Gilbert knew or agreed to at that time, he acquiesced in the payment by the Malta Vita Company of $21,000 to Wisner, to be applied to the payment of the $26,000, which he now claims was paid upon a purchase of treasury stock. The liability of the defendant, then, depends upon the jury's being able to say (1) that Gilbert did not consent to the arrangement which is clearly shown to have been made with the Malta Vita Company, and (2) that the money paid by defendant was for a purchase of treasury stock, and not as a loan, and therefore did not become an indebtedness from the company. Failing to find either of these, the verdict should have been for the defendant, as in such case there would be an absence of an unlawful conversion.

Gilbert testified that he was not present when the arrangement that Cole and defendant should have the $20,000 of notes was made. That is as far as his testimony goes upon this subject. Therefore we have said that it conclusively appears that such an arrangement was made by the majority of the stockholders. Such an arrangement was not binding upon Gilbert, in the absence of his knowledge or consent if the company did not owe defendant. Therefore it was for the jury to determine whether he did have knowledge of, or consent to, it. In case they had found that he did, a verdict for defendant should have followed. If, however, they found the contrary, the verdict should still have been for the defendant, if he was a creditor, but not if the payment was for the purchase of stock. It becomes important, then, to determine whether either proposition was conclusively shown. It is admitted that defendant paid the money claimed. In the absence of proof that it was for the pur-

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chase of stock, the record justified a direction that it made him a creditor of the company.

To prove that it was for the purchase of stock, plaintiffs offered the following testimony:

Gilbert testified:

"I listened to the testimony of Mr. Morgenthaler and others that they didn't purchase any treasury stock. I was secretary of the company, and as such kept the company's minutes. I have examined that book, and it is the record minute book of the company. I know, because I kept it as secretary, and it is in my handwriting.

"*Q.* I will ask you if the entries in here were made cotemporaneous with the transactions they record?

"*A.* They were, and they are correct.

"*Q.* Now, I show you the minutes of the meeting, June 21, 1903, and ask you if you are familiar with the entries there, and if they are the same there as they transpired at the meeting?

"*Mr. Moore:* Objected to. The meeting was not held at the company's office, but at the Phelps Sanatorium. All the managers were not present and no hour is stated for the meeting; also that the resolution is ambiguous.

"*The Court:* I will allow them to introduce the resolution, to which ruling defendant excepted. * * *

"*Q.* I will read over the names of the directors present at that time, and you may state whether or not they were all the members of the board of directors at that time. Cole, Morgenthaler, Wisner, S. D. Gilbert—was that all of the entire board at that time?

"*A.* No.

"*Q.* How many members of the board were there?

"*A.* There were five.

"*Q.* Can you state whether or not proper notices were served upon these people as to the meeting to be held?

"Objected to on the ground that the notice is the best evidence, as it is in writing.

"*The Court:* I think the notice should be produced or proof that it cannot be. Objection sustained. * * *

"*Mr. Jacobs:* I desire to read a portion of the minutes of the meeting June 21, 1902, minutes of the meeting of the board of directors present. (To which defendant's counsel objected as incompetent, immaterial, and irrelevant. The court overruled, and defendant excepted.)"

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The resolution was then read from page 63 of the record, and is as follows:

"Parties present: Luther C. Cole, Henry W. Morgenthaler, A. C. Wisner, S. D. Gilbert; Luther C. Cole presiding. Upon motion, the following resolution was unanimously passed, after a discussion of the financial requirements of the company: Resolved, that $200,000.00 of the stock of this company remaining in the treasury be offered to the stockholders of said company at fifty cents on the dollar; and we, as stockholders of said company, hereby agree, and do subscribe for our portion of said stock, as per the original allotment, the same to be subscribed for, and payments to be made at the call of the treasurer, as the requirements of the business make it necessary."

The witness continued:

"(Book produced.) This is the journal of the Grocers' Specialty Manufacturing Company. I am familiar with it. The entries were made contemporaneously with the events recorded therein. The books were kept under my supervision and direction as secretary of the company, and the entries therein are correct. They were made by Mr. J. W. Warrick. I recognize that it is in his handwriting, with which I am perfectly familiar. The books were kept under my direction and I know the entries are correct. Mr. Warrick is in Nashville today.

"*Q.* I hand you a book marked 'Exhibit 9,' called the 'journal,' and I hand you the check of Mr. Morgenthaler against this company. Also I hand you a statement that Mr. Wisner produced as proof of the fact that the company owed himself, Cole, and Morgenthaler, especially Morgenthaler. Now, I ask you to turn to page 23 in that journal, and I will ask you if you find there a credit to Mr. Henry W. Morgenthaler, and, if you do, read it.

"*A.* I do.

"*Q.* Is that the book of original entry of this company?

"*A.* Yes, sir.

"*Q.* Now read it.

"*Plaintiff's Counsel:* I offer to read this credit as an exhibit in evidence and ask permission to read it to the jury.

"Defendant's counsel objected to the reading of this

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entry as irrelevant, immaterial, and incompetent, and as not proper rebuttal, and the defendant's counsel further objected to the introduction of the entries for the reason that they were made by the agent of the plaintiff in this cause and in his own interest, and they are now offered in rebuttal to corroborate the testimony of that agent. Objection overruled and defendant excepted.

"*A.* (Reading), 'Check of H. W. Morgenthaler, 6-23, treasury stock, $6,000.00.' I have the check dated June 23, 1902. These checks are marked 'Exhibit 8, A-H.' The date of the check is the date of the entry. There is nothing on the check to indicate that the money was loaned to the company.

"*Q.* In the statement furnished by Mr. Wisner you find a statement of the corresponding amount and the corresponding date?

"*A.* There is. (Reading), 'June 24, H. W. Morgenthaler, $6,000.00.'

"*Q.* (*Mr. Moore.*) There is nothing in the written statement furnished to Mr. Wisner about treasury stock is there? (A copy of this statement furnished to Mr. Wisner is attached thereto marked 'Exhibit 7' and made a part hereof.)

"*A.* No, sir.

"*Plaintiff's Counsel:* We don't claim that. We claim that the statement is taken off this book.

"*Q.* Now, I ask you to turn to page 54 of that book and see if you find a credit there to Henry W. Morgenthaler.

"*A.* There are several. We offer the first entry in evidence. (To the introduction of this entry in evidence the same objection was made as to the other entries. Objection overruled and an exception taken.)

"*A.* (Reading), 'Check of Morgenthaler, 10-25, treasury stock, $1,000.' 10-25 means October 25.

"Among the checks produced by Mr. Morgenthaler, I find there is a draft for $2,000 made upon the Grocers' Specialty Manufacturing Company, Limited, and the Pilgrim Publishing Company. The Grocers' Specialty Company received $1,000 of this on October 25, the date of the entry in the books. That is the draft which Mr. Morgenthaler testified this company got $1,000, and the Pilgrim Publishing Company the other. This entry also appears in the statement made to Mr. Wisner, which reads, 'Oct. 25, H. W. Morgenthaler $1,000.'

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"Another entry on page 54 was offered in evidence. The same objection, ruling, and exception.

"*A.* 'Check of Morgenthaler, 11-11, treasury stock, $3,500.' That means November 11.

"Mr. Morgenthaler's check for that amount is dated November 10, 1902. The entry on the book shows treasury stock. The entry on the check shows simply payment of money. There is nothing to indicate that it was a loan to the company.

"Another entry on page 54 was offered in evidence. Same objection and exception.

"*A.* (Reading), 'Check of H. W. Morgenthaler, treasury stock, $1,000.'

"The date is January 12th. The date is not given here as it was in the other place. The first entry is January 12th, and the following is the 13th. If that was entered at the time it was received, it was between those two dates. The check is January 10, 1903, for $1,000, signed by H. W. Morgenthaler, date of entry January 12, 1903. In the Wisner statement this entry appears 'January 12, H. W. Morgenthaler, $1,000.'

"Entry on page 61 of the book was offered in evidence. Same objection, ruling, and exception.

"*A.* (Reading), 'Check of H. W. Morgenthaler, treasury stock, $1,000.'

"There is a check from Mr. Morgenthaler for $1,000 dated January 30, 1903. The above item is dated February 2, 1903. On the statement furnished to Mr. Wisner appears the entry, 'February 2, H. W. Morgenthaler, $1,000.'

"Entry on page 72 was offered in evidence. Same objection, ruling, and exception.

"*A.* (Reading), 'March 9, 1903, check of H. W. Morgenthaler, treasury stock, $2,000.'

"There is a check here March 7, 1903, for $2,000 signed by H. W. Morgenthaler. On the statement furnished to Mr. Wisner there is an entry 'March 6, H. W. Morgenthaler, $2,000.'

"An entry on page 65 was offered in evidence. Same objection, ruling, and exception.

"*A.* (Reading), 'January 23, treasury stock, $1,500.'

"The amount corresponds with the check. The date is one day later. The credit should have been given to Mr. Morgenthaler as he paid the money. Payment was made by check dated January 22, 1903, for $1,500, signed

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by H. W. Morgenthaler. In the statement furnished to Mr. Wisner, A. C. Wisner from H. W. Morgenthaler, $1,500.

"Counsel for plaintiff then offered in evidence all the journal entries that had been recited to the jury to make the record clear and to be sure. To each the same objection was made. In each case the objection was overruled, and the defendant excepted, and each entry was then specifically admitted in evidence.

"*Q.* Were all the entries you cite original entries of the transaction?

"*A.* They were.

"*Q.* I show this book; what is it?

"*A.* It is the general ledger of the Grocers' Specialty Manufacturing Company, Ltd.

"*Q.* I call your attention to page 'Exhibit 10.'

"*A.* That is one of the books kept in their regular business of the Grocers' Specialty Manufacturing Company. It is the ledger to which the journal account was transferred.

"The account was then offered in evidence, objected to as incompetent and immaterial, and because it was not binding on the defendant.

"*The Court:* That has appeared. This is also one of the books originally kept in the business of the Grocers' Specialty Company.

"*Mr. Jacobs:* He has testified to that fact. (Objection overruled and exception taken. The page was then read in evidence, a copy of which is hereto annexed, marked 'Exhibit 10,' and made a part hereof.)

"The statement furnished by Mr. Wisner was then compared by the witness, and the amounts found to be alike except the last two items on the ledger, one of $4,106.90, which was afterwards transferred from his account and paid by the Malta Vita Company. This was no part of the claim that he stated yesterday amounted to $25,000. The other item of $40, which entry appeared on Journal, page 70. The title of this account I have just been reading from is 'Treasury Stock.'

"*Q.* I call your attention to the resolution of June 21, 1902, which has been read to the jury.

"*Mr. Moore:* The date of the resolution shows for itself. Counsel read that to the jury and stated the date. I don't understand that you introduced part of it and left out the rest of it. If you did, I move to strike that out.

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"*The Court:* The motion to strike out will be overruled or denied, because, if counsel wishes to introduce the balance of the record, he may do so.

"*Mr. Moore:* I object to it. They have a paper before them and they cannot prove the contents of it by parol. I submit they cannot introduce part of the resolution and keep back the balance.

"*The Court:* He wishes to introduce it in explanation of the resolution to show the date; but the objection is sustained as far as testifying to it orally.

"*Mr. Jacobs:* Then I offer in evidence the whole of the minutes of the meetings of the board of directors of the Grocers' Specialty Manfg. Co., Limited, found on page 63 of the minutes of the company. (Record book of the Company, marked 'Exhibit A.')

"*The Court:* The whole of the minutes as they appear on that page, and the whole of the minutes of June 21, may be received in evidence. (To which ruling defendant excepted.)"

The resolution was then read in evidence, marked "Exhibit 8," and is as follows:

"Upon motion, the following resolution was unanimously adopted after a discussion of the present requirements of the company: Resolved, that two hundred thousand dollars of the capital stock of the company remaining in the treasury be offered to the stockholders of said company at fifty cents on the dollar; and we, as stockholders of said company, do hereby agree and do subscribe for our portion of said stock, as per the original allotment, the same to be subscribed for, and estimates to be made of the stock of the treasury as the requirements of the business may be necessary. Minutes of meeting read. On motion, adjourned.

"S. D. GILBERT,
"Secretary."

It will be observed that there is a slight difference between the resolution as first read, and as it appeared in the book. The court instructed the jury that this resolution did not create a present obligation on the part of the defendant, and that, as the testimony showed that no call was made by the treasurer for any payment, under the resolution, there was no obligation on defendant's part to

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pay any such on account of the resolution, unless in pursuance of that resolution defendant actually proceeded to make payment upon the stock, but, if they should find that he did afterwards so make payments, he would not be entitled to repayment of the money, and the court added:

"Now, if in this case you find that the whole $16,000 advanced by Mr. Morgenthaler was in fact payment for stock subscribed for by him, then the case is at an end, and your verdict in that case should be for the plaintiff."

This instruction was erroneous; for, if the jury should have believed that all of the stockholders had agreed that the first payment should be divided up in the way claimed by the defendant, they had a right to do so, although at the time defendant Cole and Wisner paid their money it was upon the understanding that they should take treasury stock for it. Morgenthaler's payments were made at different times, viz.: June 23, 1902, $6,000; same date, $1,000; November 10, 1902, $3,500; January 10, 1903, $1,000; January 22, 1903, $1,500; January 30, 1903, $1,000; March 7, 1903, $2,000—amounting in all to $16,000. The only evidence that was offered to show that it was paid upon the purchase of new stock consisted of the resolution in question, and the entries upon the books of the Grocers' Company of credits to Morgenthaler for money paid already quoted. The learned circuit judge appears to have held that there was no presumption from the resolution, that these payments were made for the purchase of stock, but that the entries upon the books were some evidence tending to prove that they were so made. There appears to be no evidence on the part of the plaintiff that there was anything said about it when the checks were delivered and no stock was delivered or offered.

The introduction of books of account in favor of their owners is upon the theory that they tend to prove the delivery of goods, the payment of money, or the rendition of service to or for another. In this case they were introduced, not to show that the defendant had purchased

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treasury stock, which had been sold and delivered to him, but to establish the fact that he had paid money upon an alleged special obligation to take it at 50 cents on the dollar, which obligation is denied, and which the court decided not to have been otherwise proved. It is admitted that the money was paid by the defendant, and upon this record it clearly appears to raise the relation of debtor and creditor, unless by these books it be made to appear that it was paid upon a special contract. Books of account are not competent to prove a prior special agreement. See 2 Enc. of Evidence, p. 658, note *b*, and cases cited in notes, 17 Cyc. p. 380. See, also, *In re Ward's Estate*, 73 Mich. 225.

"It is generally held that a book of accounts, although duly authenticated, is not competent evidence to show the delivery of goods under a previous express contract.

"Nor to prove work and labor done under a special agreement." 2 Enc. of Evidence, pp. 642, 643.

See *Tioga Manfg. Co.* v. *Stimson*, 48 Mich. 217. Nor, we may add, to prove that money received was paid for goods or stock that admittedly were not delivered. We must hold, therefore, that these books were not admissible, and that the court erred in leaving to the jury the question whether the money was paid as the purchase price of stock.

We are also of the opinion that there was an absence of proof of fraud in the sale of the property to the Malta Vita Company, and the arrangement to apply the notes upon defendant's claim, even if Gilbert was not aware of and did not consent to the same.

There was error in the refusal to permit defendant to show that a sum sufficient to pay all outstanding debts of the concern (except such as were due the consenting stockholders) was set aside, and put in Gilbert's hands for that purpose. Also to show by Gilbert and the receiver on cross-examination that no action had been brought against Cole or Wisner.

There was also error in refusing to admit testimony

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regarding Gilbert's claim of $5,000, the conditions upon which, and the fund from which, it was to be paid.

It is unnecessary to refer to other questions.

The judgment is reversed, and a new trial ordered.

MCALVAY, C. J., and MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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BEGHOLD *v.* AUTO BODY CO.[1]

1. NEGLIGENCE — VIOLATION OF STATUTE — DEFENSES — CONTRIBUTORY NEGLIGENCE.

   The rule that a plaintiff cannot recover damages if his injury could have been avoided by the exercise of ordinary care on his part obtains in cases where the negligence of defendant is negligence in law, arising from violation of a statute.

2. SAME—INFANTS—CONTRIBUTORY NEGLIGENCE.

   Though the care required of infants is measured in some degree by age, experience, and intelligence, they may, as a matter of law, be guilty of negligence, if not too immature to understand the danger and the necessity of acting carefully.

3. MASTER AND SERVANT — PERSONAL INJURIES — VIOLATION OF STATUTE—CONTRIBUTORY NEGLIGENCE.

   Though plaintiff, suing for a personal injury, was employed in violation of the statute (Act No. 113, Pub. Acts 1901, § 3), which recognizes the immaturity of judgment of children under 16, he cannot recover for an injury received in consequence of his thrusting his hand into a planer head on the mistaken supposition that it was not running, knowing at the time all that the most experienced person could have told him about the danger of so doing.

4. SAME—VIOLATION OF STATUTE—INSTRUCTIONS.

   Evidence that plaintiff's brother stated that plaintiff was 16

[1]Rehearing denied October 4, 1907.

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does not entitle defendant to an instruction relieving it from liability based on violation of the statute, if the foreman who employed him believed, and had good reason to believe, he was 16, where there is no evidence that plaintiff was asked his age, or that he knew of the representations said to have been made by his brother.

Error to Ingham; Wiest, J. Submitted April 16, 1907. (Docket No. 20.) Decided July 1, 1907.

Case by Carl Beghold, by next friend, against the Auto Body Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Defendant is engaged in manufacturing automobile and buggy bodies, and other articles, using considerable machinery driven by steam and water power. It operates a machine called a "sticker," or "molder," which has four knife-heads into which knives may be adjusted, and it smooths or dresses, in a single operation, one or more of the four sides of a piece of lumber. Usually two persons operate the machine—the head man, who adjusts the knives, starts and stops the machine, and feeds it, and the helper, or tail man, who takes the lumber from the machine as it comes through, and piles it. Plaintiff was employed by the defendant July 6, 1905. He was not yet 16 years of age, having been born July 28, 1889. He was set at work at the machine above described as tail man. On the second day of this employment, towards evening, his right hand was so injured in the revolving knives of one of the side heads that the thumb and all the fingers of the right hand, with the exception of the little finger, with the palm of the hand, were required to be amputated. Through his next friend he brought a suit for damages against the defendant, and recovered a verdict and judgment for $4,307.75. The jury answered in the negative the question:

"Do you find that the plaintiff was guilty of any negligence, even though slight, which contributed to his injury?"

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A motion for a new trial, based upon the single ground that the verdict was against the clear weight of the evidence, was made and was overruled.

It is averred in the declaration that defendant's establishment was a manufacturing establishment, and plaintiff was carelessly and negligently employed contrary to the provisions of section 3, Act No. 113, Pub. Acts 1901; that plaintiff was not properly instructed and warned with respect to the danger of his employment, which employment is alleged to have been to work in attendance upon said sticker or molder, to clean the same while in motion, and to take and receive from it such lumber, moldings, and material as were fed into and driven through and shaped by said sticker. When plaintiff rested his case, and again when the proofs were concluded, a motion was made to direct a verdict for the defendant, which motion was overruled. The court submitted to the jury the issues of fact:

"Was plaintiff when set at work by the defendant under the age of 16 years? Was the work given him to do dangerous to life or limb? Was he injured while about doing the work he was set to do? And was he exercising such care and caution as one of his age, intelligence, and experience ought to have brought to bear upon what he was doing when he was hurt?"

The reasons assigned in this court for a reversal of the judgment are:

1. That plaintiff was guilty of contributory negligence preventing a recovery.
2. That the court erroneously refused instructions preferred by the defendant.
3. Refusal to permit defendant's witness and foreman to answer the following question:

"Now, state, whether or not in your experience such an accident had ever before come within your knowledge."

4. The improper argument of counsel for plaintiff to the jury.
5. The verdict was against the weight of evidence, and the motion for a new trial should have been granted.

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Fred L. Vandeveer (*Thomas, Cummins & Nichols*, of counsel), for appellant.

Quincy A. Smith and *Oscar J. Hood*, for appellee.

OSTRANDER, J. (*after stating the facts*). The principal and meritorious question is whether plaintiff by his own negligence contributed to his injury. It is necessary to go somewhat fully into the evidence, beginning with that which is undisputed. Plaintiff worked at the sticker most of the time from the morning of the 6th to 5 o'clock in the afternoon of the 7th of July. On the night of the 6th, when the machine was idle, he cleaned and oiled it. He knew the work the machine did, and how it operated, the positions of the four knife-heads, the speed of the knives, the necessity for close observation to discover from the knives themselves whether or not they were in motion, and the danger of contact with them. He had nothing to do with the adjustment or starting of the machine. In beginning work, plaintiff reported to Urquhart, the foreman, who told him to go and help Ramsey, the head man on the machine, with whom plaintiff was acquainted.

Plaintiff testified:

"The work consisted of taking the sticks away from the machine and cleaning and oiling it. The sticks that I took away I placed on a truck. I didn't have anything to do with them afterwards, unless helping shove the truck to another machine. The machine stood east and west, and I was placed at the west end. The sticks were inserted or went in from the east end, and they came through to the west and were taken out and piled up by me.

"I went to work on the morning of the 6th and worked there all that day. I had taken the sticks away, and I had oiled it, and I had cleaned it. At night the first thing I cleaned it up ready for the next morning. Before that time I had never looked at the machine. I went back to work again on the 7th, and worked until about 5 o'clock, when I got hurt."

On cross-examination, plaintiff testified:

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"*Q.* Of course, it would be necessary for Ramsey to tell you what to do; otherwise you would not have known, would you?

"*A.* I knew by what I saw of the boys in there. Mr. Ramsey told me what my work was, but did not tell me how to do it. He just told me to clean up the shavings and oil it. He did not tell me how to take them from the rear end and stack them on the truck I knew how to do that because he told me about the truck, and that was all there was to it, and I knew I had seen other boys put things on the truck. I knew what I had to do without being told.

"*Q.* He had to show you the places where to oil, or else you would not have known that, would you?

"*A.* No, sir; he did not show me very much. He just told me to oil the cups. He would not have to show the places to oil, as they were standing right out. He didn't give me any instructions at all about how to oil. * * * On the first morning that I went to work for the company, I went to tailing the sticker, which consists of taking the sticks away from the machine and putting them on the truck behind me. Ramsey told me to do that. In doing that work I was in no danger, standing behind the machine, and taking the sticks off it and putting them on the truck. It did not endanger my fingers doing that, because I simply took them up and put them on the truck, and it did not endanger my life. From that place I could oil the end head. That is not the head that I got cut on."

Early in the morning of the first day, plaintiff secured a piece of putty as large as a base ball, and put it in the blower hood, which comes down to and over the knife-head in question here. The head was not running, and there were no knives in it. Some one had thrown the putty at plaintiff, and he put it in the blower. Some time before 5 o'clock on the 7th, the head man, Ramsey, was obliged to adjust the knives and knife-heads to suit the dimensions of the material to be finished in the machine. In doing so, he stopped the machine, and plaintiff oiled it. Some pieces were put through the machine to test and correct the adjustment. The north knife-head, with knives, was running. Having adjusted the machine in

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plaintiff's presence, Ramsey, for a moment, turned away. Plaintiff had been idle, and was seated on the truck. There was a newsboy in the room, with whom he exchanged some words. He left the truck, went around to the north side of the machine, put his hand in the knives, and was injured, as has been described. One person saw him when he was hurt. This man, working at another machine, saw plaintiff put the putty in the blower the day before, was impressed that the plaintiff was about to reach for it, cried out, and at the same instant plaintiff cried out on account of his hurt. The blower hood was a tin box, covering the knife-head in question, open toward the knives, and the lumber passing through the machine, and continued by a pipe leading away from the machine. It was from an inch and a half to two inches from the knife-head. It performed the office of sucking in and carrying away the shavings, dust, and chips made by the operation of the machine. No one but plaintiff knows whether he was reaching for the secreted putty when he was hurt. If he was, injury was certain. After plaintiff was hurt, bloody putty was found on the floor under the sticker head. This brings us to some statement of testimony not wholly undisputed.

Plaintiff, on direct examination, testified:

"*Q.* How did you happen to meet with the accident?

"*A.* I was sitting on the truck, and I jumped up to clean off the shavings on the surface of the machine.

"*Q.* And how did it happen that you brought your hand in contact with the knives?

"*A.* I was brushing off the shavings, and I was doing like that (indicating by a motion of his hand), and the head was right over there, and it took my hand right in that way.

"*Q.* Well, do you understand that the head that you struck your hand on—did you understand that it was running at that time?

"*A.* No, sir.

"*Q.* How long had that been running?

"*A.* About 15 minutes. It had not run before I had been there for about 15 minutes.

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"*Q.* It had not run before during the time you had been there, do you say?

"*A.* No, sir.

"*Q.* Tell the jury what there was about the fixing of that head or setting it or starting it. What happened about that?

"*A.* The man went over it, went over the machine and run the machine.

"*Q.* Who was that?

"*A.* Mr. Ramsey. He put on the heads while it was idle, and put on the knives on the head and adjusted it right, and he stopped it a couple of times while he was doing this to get the right measure of the sticks, and then he would adjust it, and he done this a couple of times, and then he started it going, and I had cleaned the machine before while it was idle and oiled it, and he got some shavings on the surface by running these sticks through, and I got up and cleaned those shavings off. Ramsey had not said a thing to me advising that he had started the head, or that it was running, and I was not aware of the fact when I undertook to clean off the shavings. On the day before and the day that I was hurt I had cleaned and oiled the machinery while it was running and brushed off some shavings when Ramsey was there. * * *

"*Q.* Could you readily discern without being careful in your looking whether or not the heads were running on it?

"*A.* No, sir.

"*Q.* For what reason?

"*A.* At a glance you would not know.

"*Q.* And why?

"*A.* Because they shine, and you would think they were just kind of metal and shine like a piece of iron there.

"*Q.* Well, what is the cause of that? Do they run fast or slow?

"*A.* They run, yes, they run awful fast. I did not receive any warning or caution or instructions from any one in the factory in regard to how I should conduct myself in order to avoid danger around the machine.

"*Q.* Describe to the jury what occurred at the time your hand came in contact with the knife-head. * * *

"*A.* There was a little paper boy in there. He was about six or seven feet of me, and I knew him real well, and I stepped over there, and I says, 'Hello, Basket,' and

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asked him how many baskets he made, and he gave a laugh. I don't remember what he said, and I went back and sat on the truck, and I had the oil can in my hand, and I seen some shavings on the surface of the machine, and I set the oil can on the truck and reached with my right hand to brush the shavings off and got caught."

On cross-examination:

"*Q.* I believe you stated that you saw Mr. Ramsey running through a couple of boards and trying to adjust that head so it would properly perform its work?

"*A.* Yes, sir.

"*Q.* Did he say anything to you at that time?

"*A.* No, sir.

"*Q.* How long was this before you got hurt? But a moment or so?

"*A.* When he was running?

"*Q.* Yes.

"*A.* No, it was three or four minutes. At the time I was hurt I don't know where Ramsey was, nor if he had his back turned to me talking with another employé.

"*Q.* Did you have any conversation with him relative to this head before you got hurt?

"*A.* No, sir.

"*Q.* He did not say anything to you?

"*A.* No, sir.

"*Q.* And you were sitting down on the—

"*A.* Yes, sir.

"*Q.* And you saw some chips there that you wanted to brush away, and you got up to do that?

"*A.* Yes, sir.

"*Q.* Did you know where he was at that time?

"*A.* No, sir.

"*Q.* You haven't any recollection of seeing him for a few moments before that, have you?

"*A.* No, sir.

"*Q.* So, of course, he could not have given you any instruction about doing that work at that time?

"*A.* He could if he had wanted to.

"*Q.* Well, I mean he didn't, did he?

"*A.* No, sir.

"*Q.* Now, it was his duty to push this wood in at the opening?

"*A.* Yes, sir.

"*Q.* And your duty to take it out?

"*A.* Yes, sir.

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"*Q.* And you and he worked there as co-employés; you assisting him, and he assisting you by putting them up, and you taking it out?

"*A.* Yes, sir. * * *

"*Q.* Before you put your hand there, did you stop to look to see whether or not those knives were in motion on the head?

"*A.* Why, I glanced at the machine, but I didn't know. I thought the machine had stopped.

"*Q.* Well, did you look to see whether or not it had stopped?

"*A.* No, sir.

"*Q.* You didn't?

"*A.* No, sir.

"*Q.* Now, you knew, of course, that that machine was used for the purpose of cutting chips away from the boards?

"*A.* Yes, sir.

"*Q.* And you realized if you got your fingers in there they would be taken off?

"*A.* Yes, sir.

"*Q.* You knew that, even though no one had told you about it?

"*A.* Yes, sir.

"*Q.* During the two days that you worked there prior to your accident, you stated that you could hardly tell the difference as to whether the heads were in motion, or whether they were standing still, because they were obliterated?

"*A.* Yes, sir.

"*Q.* Then you would have to take a chance and guess as to whether or not the heads were in motion?

"*A.* You would have to look at it very close.

"*Q.* And if you didn't look at it closely you would guess at it, wouldn't you?

"*A.* Why, I guess you would.

"*Q.* That is so, you would have to?

"*A.* Yes, you would have to look at the belt to see whether it was running.

"*Q.* If you should look at the belt, could you tell whether or not it was in motion?

"*A.* Yes, sir.

"*Q.* Because the belt would be going?

"*A.* Yes.

"*Q.* How far would you have to move to look at the belt? Just simply step over a foot or two?

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"*A.* You would have to step over and look right around.

"*Q.* And then you could see it?

"*A.* Yes, sir.

"*Q.* Now, in moving this chip you could have taken a small stick and knocked it off, couldn't you?

"*A.* Yes, sir.

"*Q.* And the machine could have been stopped also, couldn't it?

"*A.* Yes, sir.

"*Q.* And if you had done either of those there would have been no danger to your fingers?

"*A.* I thought the machine had stopped.

"*Q.* Well, I say, if either of those had been done then there would not have been any danger to your fingers?

"*A.* No, sir.

"*Q.* Because then the machine would not have been in motion, that is true, isn't it?

"*A.* Yes, sir.

"*Q.* You said a few moments ago that you saw Mr. Ramsey testing that knife-head?

"*A.* Yes, sir.

"*Q.* It was in motion at that time?

"*A.* No, sir.

"*Q.* Well, it had been previously?

"*A.* No, sir.

"*Q.* Well, how did he know that it would not successfully perform its work, then, if he had not tested it?

"*A.* I don't know.

"*Q.* Isn't it true, a few moments before, that he did run it; he would run it, and then he would stop it, and he would keep on doing that until he got the machine in the order he wanted it?

"*A.* Yes, sir.

"*Q.* And how many times do you think he had stopped it?

"*A.* Once or twice.

"*Q.* And each time he had started it up and ran some pieces through to see if it was doing all right, didn't he?

"*A.* Yes, sir.

"*Q.* That is the way he does that?

"*A.* Yes.

"*Q.* But at the time you got hurt you say you don't know whether it was running or not?

"*A.* Yes.

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"*Q.* But you could have ascertained if you had looked at the belt easily?

"*A.* Yes, sir.

"*Q.* And that you simply took the chance and thought it was not running when you tried to wipe the chip away?

"*A.* I did. I didn't see any danger."

Ramsey testified that he told plaintiff, upon setting him to work:

"Now, young man, you want to be careful and keep your hands off from this machine while it is running; if you don't it will cut you, if you get your hands on it. * * *

"*Q.* Did you ever give this boy, the plaintiff in the case, any instructions about, or requests about, oiling and cleaning the machine while it was in motion?

"*A.* I did not.

"*Q.* Did you ever see him do it?

"*A.* I did not.

"*Q.* Did you ever request him to take chips from off the bed of the machine while the heads were in motion?

"*A.* No, sir.

"*Q.* Was there any necessity for it?

"*A.* There was not.

"*Q.* What if chips accumulated on the bed of the machine, would that in any way interfere with the passage of the board through it?

"*A.* It would not.

"*Q.* What would occur if a board would happen to strike those chips?

"*A.* Simply shove it out of the way.

"*Q.* Would it push it through the machine and let it fall on the floor?

"*A.* It would be according to where the chips struck. If it struck on the back head, it would push it up until it came to the bottom of the head, and it would drop down through. * * *

"*Q.* I wish you would narrate what you know about it to the jury. Give them as much information as you can about it.

"*A.* Well, after starting up that afternoon and running through those 150 pieces, one man had run with me, and I had occasion to stop and oil occasionally, and I stopped the machine and told the young man to oil it up,

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and he did so, and I came back and started the machine and run one piece through, stepped to the back end of the machine, and took the measurement to see that all was well, and I finds it was all right. I turned around and spoke a few words to Jim Noble, possibly talked to him a quarter of a minute. The boy at that time was sitting on the truck, and after I finished my talk with Mr. Noble I turned my back to the young man and took a chew of tobacco, and whirled around on my heel and grabbed the foot lever to throw it in gear to start the timber on through, and just as I put my hand on the lever, I heard the head stop, and I looked around and I saw the young man was fast, and I immediately run around where he was and grabbed his hand. The head had stopped.

"*Q.* Did you go over to the doctor's with him?

"*A.* I did.

"*Q.* Did you at that time have any conversation with him relative to the way in which he sustained his injury?

"*A.* I did.

"*Q.* What did he say about it?

"*A.* I said: 'Carl, how did you get hurt?' He said: 'I forgot the machine was running.'"

Witness Noble, who saw the plaintiff at the moment of injury, testified:

"*Q.* Did you see the accident occur that occurred to this boy?

"*A.* I saw it.

"*Q.* What were you doing at that time?

"*A.* Wiping out a box on my machine.

"*Q.* How far away were you?

"*A.* About 10 feet.

"*Q.* Describe as nearly as you can the circumstances leading up to this accident.

"*A.* Well, in the first place, I had a hot box on my machine, and I took the box off, and was wiping it off, and I set down on the corner of my bench wiping it off, and I went over to Ed, and spoke to him, that is, I said, I can't remember about all the talk, and—

"*Q.* Who do you mean by Ed?

"*A.* Mr. Ramsey, he was sitting on a car right back of the sticker, and I went back again. I was only about a quarter of a minute or so, and I went back, and Ed had been running a piece through the machine, and I guess

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he had run 150 pieces of them, and when I went back I noticed Ramsey turn around and take a chew of tobacco, and then his back was turned. Well, in the first place, a newsboy came in and brought my paper, and Carl slung a block at the newsboy, and the newsboy asked me who slung the block, and I told the boy that Mr. Brackett slung the block. He is the man that run the band saw, and the boy turned around with a kind of a smile. He didn't do any more.

"*Q.* Well, who did actually throw the block?

"*A.* Well, Carl threw the block; I seen him.

"*Q.* How did you happen to make the statement that Mr. Brackett threw the block?

"*A.* I done it as a joke more than anything else, because the little newsboy was always laughing when he came in.

"*Q.* What was Carl doing just before the accident occurred?

"*A.* Sat on the car.

"*Q.* What do you mean by car?

"*A.* The truck they pile the stuff on.

"*Q.* What caused him to get up and go to the north head?

"*A.* Well, I could not say what caused him to get up; but the newsboy kind of stepped over to the other side, and when he stepped over there, he stepped over to the other side of the band saw, and when he stepped over there Carl jumped off the car quick, and he came around the side of the machine and stuck his hand in the head. When he stuck his hand in the side of the head, he hollered, or I hollered, and then he hollered. * * *

"*Q.* When this boy came up from the—got up from the truck— I understand you to say he got up and ran around the rear of the machine and put his hand into the head?

"*A.* He went around the side of the machine.

"*Q.* Around the side of the machine?

"*A.* Yes.

"*Q.* Did you see him brush any shavings away from in front of that?

"*A.* No, it was done too quickly.

"*Q.* Did you assist in taking his hand?

"*A.* I did.

"*Q.* From out of the knives?

"*A.* I did.

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"Q. How long had you worked in the vicinity of that machine prior to this accident?

"A. I should judge eight months, or a year.

"Q. Did you work for the two days before the boy got hurt?

"A. Yes, sir.

"Q. During that time did you see him oiling the machine or cleansing it while it was in motion?

"A. Not when it was in motion; no, sir. * * *

"Q. You saw Carl about to make some motion towards the knife-head with his hand, did you not, before he did get caught?

"A. No, sir; he immediately got up and came around and stuck his hand in the machine. It was done so quick, just as quick as that. There was no brush."

Plaintiff lacked but a few days of being 16 years of age. In school, he had gone to the eighth grade, and had had a little algebra. At the trial, nine months after he was hurt, he was 5 feet 8 or 9 inches in height, and weighed, when he was injured, 130 pounds. He was in possession of his faculties and the enjoyment of his senses. His answers to questions asked him upon the trial indicate intelligence. His action which resulted in injury was voluntary, intentional. Whether he intended to get the putty, or to brush off the shavings, he did what he intended to do. He supposed, he says, that the machine had stopped. He acted upon this assumption. In entertaining it, he was misled by no one, did not fail in appreciating the danger from the machine when in motion, was influenced by no failure to warn him, would not have been restrained by any warnings or instructions given him in entering the employment. If he had not entertained the idea that the knives were not in motion, it may be assumed that he would not have been hurt. The exercise of the most ordinary care would have prevented the injury. He was needlessly, inexcusably careless. The general rule is that a plaintiff cannot recover damages if the injury could have been avoided by the exercise of ordinary or reasonable care on his part. This rule obtains in cases where the negligence of defendant is negligence

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in law, arising from violation of a statute. 1 Thompson on Negligence, §§ 210, 211; 2 Labatt on Master & Servant, § 651; 1 Bailey on Personal Injuries, § 1290 et seq.; *Queen* v. *Iron Co.*, 95 Tenn. 458 (30 L. R. A. 82); *Thompson* v. *Edward P. Allis Co.*, 89 Wis. 523; *Reynolds* v. *Hindman*, 32 Iowa, 146; *Taylor* v. *Carew Manfg. Co.*, 143 Mass. 470; *Sterling* v. *Carbide Co.*, 142 Mich. 284; *Roberts* v. *Food Co.*, 142 Mich. 589. And while the care required of an infant is measured in some degree by age, experience, and intelligence, courts have many times determined, as matter of law, that they were guilty of negligence (*Henderson* v. *Railway Co.*, 116 Mich. 368; *Berlin* v. *William B. Mershon & Co.*, 132 Mich. 183; *Hess* v. *Woodenware Co.*, 146 Mich. 566; *Roberts* v. *Food Co.*, supra), or were not too immature to understand the danger and the necessity for acting carefully (*Borck* v. *Nut Works*, 111 Mich. 129; *Palmer* v. *Harrison*, 57 Mich. 182). In each of the cases of *Sterling* v. *Carbide Co.*, supra, *Ertz* v. *Pierson*, 130 Mich. 160, and *Allen* v. *Jakel*, 115 Mich. 484, the plaintiff was, as here, under the age of 16 years. In *Ertz* v. *Pierson*, and in *Allen* v. *Jakel*, it was held that whether reasonable care required that instruction should have been given to plaintiff as to the manner of doing the work was a question for the jury. In those cases, and in *Sterling* v. *Carbide Co.*, plaintiff was employed to operate dangerous machinery. The employment was dangerous, and certain dangers were obvious. It was said in the opinion in *Allen* v. *Jakel*:

"It sometimes happens that the dangers of a tool or machine are obvious, yet some methods of use are much safer than others. Skill and dexterity are essential, and prudence dictates that inexperienced persons, especially young children, should have some instruction or opportunity to learn the proper way before they are allowed to attempt to use them. Whether this was such a machine, and whether the opportunity for observation was all of the instruction reasonably necessary, were questions to be submitted to the jury, not being sufficiently clear to war-

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rant us to dispose of them as questions of law, arising upon undisputed facts."

These cases and the case at bar are distinguished by the fact, among others, that in the instant case, with respect to the particular action which resulted in injury, plaintiff knew all that the most experienced person could have told him. Observation must in every case follow upon instruction, and knowledge, however acquired, must be applied. Plaintiff exercised no judgment. There is no reason for doubting the truth of his own statement. He put his hand in revolving knives, supposing they were not revolving; knowing then, as well as he knows now, that if they were revolving he would be injured; knowing that whether they were revolving or not could be determined only by close observation of the knives themselves; knowing that by a mere glance at the belt he could determine the fact absolutely. Although the employment of plaintiff was in violation of a statute, and, let it be added, of a statute which recognizes the fact that a boy under the age of 16 years is more likely to act from impulse and with less judgment than a man, the injury is so clearly one resulting entirely from the carelessness of plaintiff that the court should have withdrawn the case from the jury.

It is proper to say that in our opinion none of defendant's request to charge which should have been given were refused, although in some cases the precise language of the request was not employed. The court refused to instruct, as requested, that:

"If defendant's foreman who employed plaintiff had reason to believe, and did believe at the time he employed him, he was above the age of 16 years, then such employment would not be contrary to the statute, and plaintiff cannot recover on the ground that he was employed at employment dangerous to life and limb when under the age of 16 years"—

But instructed that:

"If the boy was in fact under the age of 16 when hired

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by defendant, and was set at work dangerous to life or limb, it does not remove the bar of the statute for defendant to show that it believed him to be above 16, or that the brother told defendant the plaintiff was 16."

Whether plaintiff's own representations as to his age, aided by corroborating evidence, would in any case estop him to assert the statutory negligence of defendant, is a question not presented. It is not charged that defendant wantonly or willfully, but only that it carelessly and negligently, violated the statute. The testimony for defendant is that plaintiff's adult brother, who applied for work for him, and himself was employed in the same establishment and in the same room, stated to the foreman of defendant, who hired the boy, that he was 16 years of age, and that to the foreman he looked to be over 16 years old. There is no evidence that the boy was asked his age, or that he knew of the representation said to have been made by his brother, and the fact that any inquiry was made, and that the brother made any representations about the matter of age, is expressly denied. Under these circumstances, the instruction given was a proper one.

The testimony excluded was immaterial. The argument of counsel for plaintiff to the jury was, some of it, clearly improper, calculated to prejudice the jury, and was persisted in after repeated rebukes and admonitions from the court.

It is unnecessary to further characterize it, since, because of the error pointed out, the judgment is reversed, and a new trial granted.

MCALVAY, C. J., and MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

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ENTERPRISE FOUNDRY CO. v. IRON MOLDERS' UNION OF NORTH AMERICA, LOCAL NO. 186.

1. APPEAL—SCOPE OF INQUIRY—CONTEMPT PROCEEDINGS.
   The fact that an appeal, instead of certiorari, or, after commitment, habeas corpus, is taken to review an order adjudging appellant guilty of contempt in violating an injunction, will not operate to enlarge the field of inquiry in this court beyond what it would be had the review been sought in the proper way.

2. CONTEMPT—VIOLATION OF INJUNCTION—STATUTE.
   Willful disobedience of an injunction restraining defendants from interfering with complainant's employés is punishable as a criminal contempt, under 1 Comp. Laws, § 1098, subd. 3.

3. SAME—JURISDICTION.
   Proceedings to punish one of the defendants in a chancery suit for violation of an injunction restraining interference with complainant's employés examined, and *held*, that the court had jurisdiction to issue the injunction, and to determine, in the contempt proceeding, whether defendant was guilty of a willful disobedience thereof.

Appeal from Muskegon; Sessions, J. Submitted April 16, 1907. (Docket No. 77.) Decided July 1, 1907.

Bill by the Enterprise Foundry Company against the Iron Molders' Union of North America, Local No. 186, John Richardson, and others, to enjoin an unlawful interference with complainant's business: On appeal of John Richardson from an order adjudging him guilty of contempt. Dismissed.

On November 7, 1905, an injunction was issued out of the circuit court in chancery for the county of Muskegon, directed to certain labor unions and certain persons named therein, among them the appellant, John Richardson. It was served on said Richardson. Later, in the same month, but on what date the printed record does not

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disclose (Supreme Court Rule 35), the complainants in the suit filed a petition, supported by affidavits, praying for a rule requiring said Richardson to show cause why he should not be punished for the willful violation of said injunction. An order to show cause was issued, and an answer filed, supported by the affidavit of said Richardson. Such proceedings were had, including the examination of witnesses in court, that on January 30, 1906, a judgment (and for this and the date of it we are obliged to go to the return filed in the office of the clerk of this court) was entered, the material portions of which read as follows:

"In the above-entitled matter the respondent John Richardson, having heretofore on, to wit, the 22d day of December, A. D. 1905, by and before the Honorable Fred J. Russell, then being circuit judge of the said county, been duly adjudged guilty of a criminal contempt of court, and the said John Richardson having been duly arrested by a bench warrant issued out of the said circuit court and brought before this court that judgment might be imposed upon him, and the said John Richardson having been brought before the bar of the court, * * * the court * * * doth find: * * *

"3. That the evidence taken upon said hearing shows that said John Richardson was guilty of willful and criminal contempt of court in that the said John Richardson did on, to wit, the 20th day of November, 1905, attempt by persuasion and threats to compel one Julia A. Towne to cancel an arrangement and contract with the complainant, the Enterprise Foundry Company, and to induce her to not further furnish, prepare, or deliver to the said foundry company the meals and supplies necessary for the use of its nonunion employés, in violation of the contract which she had entered into with said foundry company.

"4. That said John Richardson, on, to wit, the 23d day of November, 1905, was guilty of a willful and criminal contempt of court in violating the injunction before issued out of said court by attempting by persuasion, denunciation, and intimidation to induce two of the employés of said Enterprise Foundry Company, to wit, Frank Anderson and William Tryon, to leave the employment of said foundry company.

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"5. That said John Richardson was guilty of willful and criminal contempt of said court, in that he did on, to wit, the 23d day of November, A. D. 1905, in company with others of the said striking employés of said Enterprise Foundry Company, assault the said Anderson and Tryon upon the public streets of the city of Muskegon with an opprobrious name, to wit, 'Scab.' Therefore the objections alleged by the said John Richardson and his counsel are hereby overruled, and it is ordered, adjudged, and decreed, and this court, by virtue of the authority in it vested, doth order, adjudge and decree that the defendant John Richardson do pay to the register of this court for the people of this State within six days from this date a fine in the sum of $100, and, in default of the payment of said fine, the said John Richardson be committed to the common jail of the county of Muskegon until said fine be paid, but not exceeding a period of 30 days."

From this order and determination, the said Richardson claimed, and has taken, an appeal to this court, filing a bond, in which is recited the fact that on his application proceedings had been stayed for the purpose of such appeal. At the hearing appellant was not in court, and produced no testimony. It appears that the court first made an order reciting that said Richardson had been guilty of the several acts mentioned and set forth in the petition, that such acts constituted a willful violation of the injunction, and ordering "a bench warrant attachment" to issue, directed to the sheriff of the county, commanding him to arrest appellant and bring him before the court, that judgment might be pronounced. This order is dated, as shown by the return to this court, on December 22, 1905. The return indicates that the warrant issued and the judgment, herein set out in part, recites the fact that appellant was at the time judgment was entered in court.

It is contended that the circuit court was in error in finding appellant guilty:

"1. Because the proper practice in such case as established in this State was not followed. That interrogatories were not filed for defendant's benefit, as required by

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such practice, although they were demanded and insisted upon by him. That the judgment of the circuit judge did not state of what the contempt consisted of which he was found guilty, and that said judgment was not in form or substance as is required by the statute.

"2. Because there was, on defendant's part, no such violation of the preliminary injunction as would form a basis for contempt proceedings."

Chamberlain & Walker, for appellant.

Cross, Lovelace & Ross (*Turner & Turner*, of counsel), for appellee.

OSTRANDER, J. (*after stating the facts*). The practice pursued to obtain a review of the judgment has not been questioned by counsel. The fact that an appeal has been taken, instead of a writ of certiorari, or, after commitment, a writ of habeas corpus, by one or other of which methods review should have been sought, will not operate to enlarge the field of inquiry here. See *In re Wood*, 82 Mich. 75, 80, 81. What the petition and the accompanying affidavits brought to the attention of the court was the fact that appellant had willfully disobeyed the injunction. If he had, he was punishable as for a criminal contempt under 1 Comp. Laws, § 1098, subd. 3. It was the truth or falsity of this alleged fact which the court proceeded to investigate. Appellant was notified of the accusation, and given a reasonable time to make his defense. The proceeding was not instituted to enforce a civil remedy, or to protect the rights of a party to a civil action. The court had jurisdiction to issue the injunction, and to determine, in this proceeding, whether appellant was guilty of a willful disobedience thereof.

Neither the interlocutory order nor the judgment of the court are printed in the record, and counsel for appellant having asserted, in their brief, that they "had no means of discovering of what acts of commission or omission defendant has been convicted," this court might well be excused from attempting to learn whether

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the acts of which appellant was convicted were forbidden by the injunction. We have, however, as is above indicated, examined the return, and find that the court has convicted appellant specifically of acts forbidden by the injunction.

An order will be entered dismissing the appeal and remanding the record.

McALVAY, C. J., and MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

SUTTON v. RANN.

1. SUBSCRIPTIONS—LIGHTING PLANT—VOLUNTARY AID—LEGALITY OF CONTRACT.

   A contract, by which certain citizens of a village agree to pay plaintiffs a stipulated sum of money as a voluntary aid in the construction of an electric lighting plant and flouring mill in the village in which such citizens reside, is not clearly illegal on its face.

2. SAME—MUNICIPAL AID—CONTRACT—CONSTRUCTION.

   In an action upon a contract by which defendants, citizens of a village, agreed to pay plaintiffs a stipulated sum of money as a voluntary aid in the construction of an electric lighting plant and flouring mill in the village, evidence examined, and *held*, to clearly show that defendants were, and were understood to be, a mere committee through which the parties attempted to convey a bonus from the village to plaintiffs, and that no consideration was paid or promised them for their apparent undertaking.

Error to Shiawassee; Smith, J. Submitted April 16, 1907. (Docket No. 118.) Decided July 1, 1907.

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Assumpsit by Edward Sutton and George Mackey against Benjamin F. Rann, William Case, and Abraham L. Beard upon a contract of guaranty. There was judgment for defendants on a verdict directed by the court, and plaintiffs bring error. Affirmed.

The parties entered into a written contract, which will be found set out at length in the opinion in *Village of Morrice* v. *Sutton*, 139 Mich. 643, 646–648. This suit is brought to recover upon that contract; the declaration counting specially thereon. Defendants pleaded the general issue with notice that defendants had paid upon the contract all they were obligated to pay; that the contract was illegal and void because, when it was made, it was understood and agreed by the parties thereto that $2,000 of the money therein provided to be paid was to be taken from the public treasury of the village of Morrice, defendants to receive the money from the village on behalf of plaintiffs and pay it over to them; that the money was so received and paid, and defendants had no interest in and received no consideration for making said contract; that the contract was and is void on grounds of public policy. Notice was given, too, that all matters involved in the suit were res adjudicata by virtue of the suit and judgment in the case above referred to.

The testimony for plaintiffs tended to prove performance of the contract on their part and the payment of $1,000 thereon, leaving due the sum of $2,000 and interest. No testimony was offered on the part of defendants; but, upon cross-examination of plaintiffs' witnesses, over objection, the facts stated in the opinion above referred to (which need not be repeated here) were made to appear, with other facts which, it is claimed, conclusively proved that the contract entered into was a mere form and blind, a step in a scheme participated in by all the parties to unlawfully obtain from the village of Morrice a bonus or gift to plaintiffs. A verdict for defendants was directed.

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Watson & Chapman, for appellants.

John T. McCurdy and *Albert L. Chandler*, for appellees.

OSTRANDER, J. (*after stating the facts*). The question presented in this case was not involved in *Village of Morrice* v. *Sutton*, 139 Mich. 643. The contract is not upon its face clearly illegal. There is no rule of law forbidding citizens to contract to pay in part for the erection and operation, in the communities in which they live, of mills or power plants. The undisputed evidence in this case is that the citizens of Morrice contributed the $1,000 admitted by plaintiffs to have been received by them on the contract.

Upon cross-examination of plaintiffs, defendants were permitted to prove that other $2,000 had been paid to them in the form of certificates of deposit issued to R. B. Craig, who was at the time president of the village of Morrice, and by him indorsed, after which payments plaintiffs issued a receipt in the following form:

"We hereby acknowledge that (defendants) has this day in all things fulfilled their part in and to the above contract."

Plaintiffs then offered evidence of the recovery of the money so paid by the village of Morrice in the suit above referred to, and testimony tending to prove that, although they were aware of the fact that defendants proposed, before making the contract in question, to secure the money by the issue and sale of village bonds, they declined to deal directly with the village or to accept the bonds.

The meritorious question presented is whether, upon their claim that they relied upon the undertaking of defendants according to the terms of the written contract, plaintiffs were entitled to the opinion of a jury. Upon this point the testimony has been carefully examined. There is testimony, particularly that of one of the partners, which, standing alone, would require us to say that

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the question could not be determined as one of law. Considered with the testimony of the other plaintiff (and plaintiffs were partners), the language employed in the contract, the fact that the village voted to issue bonds and sold the bonds before the contract was made, the fact that advice was sought by plaintiffs concerning the method of procuring the turning over of the money to them, and the nearly conclusive fact that, instead of procuring insurance upon the completed building in accordance with the terms of the contract, plaintiffs took out a policy which provided that the loss, if any, "shall be held payable first unto the village of Morrice, Mich., to the extent of $2,000, less the total amount which the assured have paid for the maintenance of the said $2,000 insurance from the date of this policy to the time of the fire. The insurance of the village of Morrice is, however, void, provided the mill shall be rebuilt in case of its destruction by fire"— we are obliged to say that a jury would be permitted to come to no other conclusion than that the defendants were, and were understood to be, a mere committee, and that there was no consideration paid or promised to them for their apparent undertaking. What was intended by all parties to be accomplished was accomplished.

The judgment is affirmed.

MCALVAY, C. J., and MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

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UNDERWOOD *v.* A. W. STEVENS CO.

1. NEGLIGENCE — FIRE — CONTRIBUTORY NEGLIGENCE — TRACTION ENGINE—EVIDENCE—EFFECT.

In an action for the loss of a storehouse destroyed by fire as the result of the negligent operation of a traction engine while being removed from plaintiff's premises by defendant, evidence examined, and *held*, that it was open to the jury to find that plaintiff, on being told that all that was wanted was a chance to take the engine, had a right to go about his other business in the expectation that defendant's agents would use such precautions to prevent damage as were necessary, and that plaintiff was not negligent in failing to instruct them as to necessary precautions.

2. SAME—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

The negligence relied upon being the propelling of the engine past plaintiff's buildings without the bonnet on the smokestack and with the damper open, the mere presence of plaintiff, and his knowledge that the bonnet was off and the damper open, when the engine was first moved, did not amount to contributory negligence on his part, unless he was in some way responsible for the absence of the bonnet, or had the danger in mind.

3. SAME—INSTRUCTIONS—SUPPORT FROM TESTIMONY.

There is no error in stating to the jury that plaintiff's claim was that he supposed that defendant's agents would put on the spark arrester and have the protection afforded by its use, though there is no direct testimony to that effect, where it is manifest from the evidence that he relied upon them to take the usual precautions, which would, according to the testimony, include the bonnet.

4. EVIDENCE — EXPERT TESTIMONY — SUBJECT — PROPER USE OF TRACTION ENGINE.

Expert engineers may express an opinion as to whether the running of a traction engine past buildings where there was inflammable material, with the damper open, and no spark arrester, was a proper operation of the engine, since it is not a matter necessarily within common knowledge as to how much the issue of sparks would be increased by an open damper.

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Error to Lenawee; Chester, J. Submitted April 17, 1907. (Docket No. 76.) Decided July 1, 1907.

Case by Edward F. Underwood against the A. W. Stevens Company for the negligent burning of plaintiff's building. There was judgment for plaintiff, and defendant brings error. Affirmed.

Frank A. Dean (*James Helme*, of counsel), for appellant.

Bird & Sampson, for appellee.

MONTGOMERY, J. This is an action on the case brought to recover damages for the loss of a storehouse and contents, which were destroyed by fire as the result of the negligent operation of a traction engine while being removed from plaintiff's premises by defendant, who claimed the right of possession thereto by force of a chattel mortgage. The engine was a second-hand one, and was owned by the Huber Manufacturing Company. It was purchased and paid for by plaintiff without any knowledge on his part of the chattel mortgage. Soon after the purchase the defendant demanded the possession of the engine. The demand was refused. The next day defendant, in company with the sheriff of Lenawee county, again demanded the engine. Upon being assured by the sheriff that the chattel mortgage had been kept renewed, and that it was undoubtedly good, and being informed that, if the engine was not delivered to them, legal proceedings would be instituted to get possession of it, the plaintiff yielded the possession to them. The engine was fired up by defendant's agents and propelled under its own steam by the storehouse. Soon afterwards the storehouse was seen to be on fire by a neighbor. Plaintiff and his family left home to go to the village about the time the engine left the premises. The storehouse and contents were wholly consumed. A verdict for $502.93 was returned by the jury, judgment entered

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thereon, and defendant has brought the case here by writ of error.

The negligence complained of in the declaration, and upon which recovery was had, was:

1. Propelling the engine by the storehouse under its own steam without a bonnet or spark arrester on the smokestack.
2. Propelling the engine by the storehouse under its own steam with the damper open.

It is contended that the plaintiff participated in the removal of the engine, and was as much responsible for its being run with the screen off and the damper open as was defendant's agents. As the question of plaintiff's contributory negligence was submitted to the jury under instructions which will be adverted to later, the question on this branch of the case is whether, under plaintiff's testimony, it appears that he participated in the acts which were negligent, or knowingly omitted to apprise defendant's agents of the danger or of some means of avoiding it. The engine was in an engine house, the door of which was too low to admit the engine with the hood on. This hood, which consisted of wire screen to be attached to the top of the smokestack, had been removed and hung on a nail driven into a post in the engine house in plain sight, as plaintiff testifies. It was a part of the equipment of the engine and bought with it. It appears that plaintiff on the day in question was present when the engine was fired up. He pointed out to the engineer whom defendant's agents brought with them some kindlings. A fire was built, and the engine was run out of the engine house, a very short distance. Plaintiff himself then moved the engine two or three feet farther away from the engine house. At this stage the party adjourned for dinner. Defendant's agents, numbering six, including a licensed engineer, ate dinner with plaintiff. After dinner defendant's agents again fired up the engine. The plaintiff was present for a short time, but his testimony tends to show that before the engine was moved again he

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had left to go to the barn to hitch up a horse for his wife to drive to the city. He testified that, when the engineer moved out of the yard, he (plaintiff) was with the horse and buggy going up to the house. There was testimony that at this time the engine was being moved with the dampers open and the bonnet off.

The defendant's counsel contend that plaintiff was himself in fault in not requiring the bonnet to be put on. Plaintiff's testimony was as follows:

"*Q.* And did they put the bonnet on?
"*A.* No, sir.
"*Q.* And what is the bonnet?
"*A.* It was right on a post by the tank, where it is today.
"*Q.* In the building where the engine was?
"*A.* Where the engine was; two feet ahead of the tank, right in plain sight.
"*Q.* Now, what was the bonnet? Was that a protection against fire in any way?
"*A.* Yes, sir; it is made of wire and put on top of a smokestack, always put on top when we move by a building. A wire screen.
"*Q.* Well, why wasn't it on the engine?
"*A.* It was took off to back the engine under the shed. It was so low, and always took it off and put it on that post there out of the way. It was not out of repair in any way, so that it couldn't have been used. * * * I kept this bonnet or spark protector right on a post about two feet ahead of the tank in the other part of the building. The tank run in one side and the engine in the other. Had to take the screen out because it wouldn't run under— * * *
"*Q.* Now, did you call their attention to this bonnet at the time, tell them where the bonnet was?
"*A.* No, sir.
"*Q.* Why not?
"*A.* Because they told me all they wanted was a chance to take the engine.
"*Q.* Do you know whether the chattel mortgage covered the bonnet?
"*A.* I do not.
"*Q.* Did you buy the bonnet with the engine?
"*A.* Yes, sir. * * *

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"Q. Did you think it was dangerous for him to go out of there without any bonnet on?

"A. I didn't think anything about it. I didn't have any thought on that point.

"Q. Did you think that the bonnet belonged with the engine?

"A. Supposed it did, came with it.

"Q. You knew that they were going away without it?

"A. Why, I didn't know what they were going away without.

"Q. You saw that it wasn't on the smokestack?

"A. I did.

"Q. Why didn't you call their attention to it?

"A. I was not thinking about that.

"Q. Is that the only reason?

"A. Yes, sir.

"Q. Did you think they were entitled to it under the chattel mortgage?

"A. Why, as much as they were to the engine. The tank at this time was in the east half of the engine shed. There was no partition. It was all open."

We think it was open to the jury to find that plaintiff, on being told that all that was wanted was the chance to take the engine, had the right to go about his other business in the expectation that the defendant's agents would use such precautions as were necessary.

The court charged the jury as follows:

"In order to charge the plaintiff with contributory negligence in this case, you must find that his negligence contributed to the proximate cause or causes of the fire. In other words, unless the plaintiff was in some way responsible for the bonnet being left off, or the damper opened, if you find the damper was open, he could not be chargeable with contributory negligence in this case; and unless the plaintiff knew or had in mind that the bonnet was left off, or that the damper was open, when it was being driven by the buildings of the plaintiff where the sparks would blow towards the building in question, he could not be chargeable with contributory negligence."

We think this instruction correctly states the law. It is true, as contended by plaintiff's counsel, that ordinarily a man face to face with danger cannot excuse

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the want of care by claiming that he did not have the danger in mind. This rule applies whenever the party concerned has a function or duty to perform in averting the danger for his own or other's protection. In this case, however, the plaintiff owed defendant no duty except to avoid active negligence. He had the undoubted right to assume that defendant would use due care. If, indeed, he had it in mind in advance that the bonnet had not been put in place, and from this inferred that it was not the purpose to take it, he might properly have been found guilty of negligence, but this was a fair question for the jury.

It is contended that the court was in error in stating plaintiff's claim to the jury, in that he stated that plaintiff's claim was that he supposed that defendant's agents would put on the spark arrester and have the protection afforded by its use. There was no such direct testimony. The plaintiff evidently did not have any particular precaution which he expected of defendant's agents in mind; but, as he testifies that he relied upon their assurance that all they wanted was a chance to take the engine, it is manifest that he relied upon them to take the usual or necessary precautions, which would, according to the testimony, include a use of the bonnet. We do not think the jury were misled by this statement of the trial judge.

Error is assigned upon a ruling of the circuit judge permitting competent engineers to express an opinion as to whether the running of this engine past buildings where there was inflammable material, with the damper open, and no spark arrester, was a proper operation of the engine, as not within the domain of expert testimony. We think the testimony was competent. It is not a matter necessarily within common knowledge as to how much the issue of sparks would be increased by an open damper.

We discover no prejudicial error. Judgment affirmed.

MCALVAY, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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WILLIAMS v. VERONA MINING CO.

1. MASTER AND SERVANT—MINES — INSPECTION — ASSUMPTION OF RISK.

   A pumpman employed in a mine long enough to raise a presumption of acquaintance with the system under which it was worked will be deemed to have assumed the risk of having the duties of watchman performed by the shift boss.

2. SAME—FELLOW-SERVANTS — MINES — PUMPMAN AND BRAKEMAN.

   Recovery against a mine owner for the death of a pumpman in the mine cannot be based on the negligence of a brakeman having control of the hoisting machinery, they being fellow-servants.

3. SAME—PERSONAL INJURIES—NEGLIGENCE—CUSTOM — EVIDENCE —SUFFICIENCY.

   In an action against a mine owner for the death of a servant, a pumpman, evidence examined, and *held*, that there was none to show a custom of defendant of leaving its engine house and hoisting machinery without any one in charge during the hour between shifts, while pumpmen were in the mine, nor to show that the employment of a particular brakeman was such as to leave him to infer the right to leave his post of duty at such times.

Error to Gogebic; Haire, J. Submitted April 17, 1907. (Docket No. 95.) Decided July 1, 1907.

Case by Mary A. Williams, administratrix of the estate of John Williams, deceased, against the Verona Mining Company for the negligent killing of plaintiff's intestate. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

George O. Driscoll, for appellant.

Belmont Waples (*Howard T. Abbott* and *Davis & Hollister*, of counsel), for appellee.

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MONTGOMERY, J. This is an action to recover for injuries suffered by the plaintiff's intestate resulting in his death. The action is brought under section 10117, 3 Comp. Laws.

Plaintiff's intestate, John Williams, was employed as pumpman in the defendant's mine. The mine was a one-shaft mine, contained at that time nine levels, the ninth level being the bottom level, and was about 600 feet deep. It was about 500 feet in depth from the first to the seventh level, and about 100 feet in depth from the seventh to the ninth level. Decedent was employed on the ninth level. There was a shaft sunk from the surface to the seventh level, and at a point 200 feet or a little more in a northerly direction from the bottom of this shaft from the surface to the seventh level there was another shaft or winze sunk to the ninth level. There were ladderways in each of those shafts. The shaft which extended from the surface to the seventh level was fitted up with a skipway and skip, and was called the "skip shaft;" and the shaft which extended from the seventh to the ninth level was fitted up with a cageway and cage and was called the "cage shaft." The skip and cage were operated by means of drums in an engine house on the surface in charge of employés of defendant, called "brakemen;" the skip and cage being attached to the drums by means of cables. The cage and skip were hoisted and lowered in response to electric bell signals from the men on the surface and in the several levels of the mine, except the ninth level, at which there was no signal wire. All that a person in the mine (except at the ninth level) who wanted to be hoisted out had to do, provided there was a brakeman at the drums, was to ring a bell, and he could be hoisted out by means of the skip and cage. The ladderways mentioned were constructed of ladders about 16 feet long, one setting behind the other, and a manhole from one to the other, and there was a partition or dividing place between the ladderway and the skipway and cageway. The men who were working in

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the mine sometimes rode on the cage from the seventh to the ninth level, and sometimes they "walked." The seventh level of the mine was simply a cross-cut. There was a track there on which they transferred cars from the skip shaft to the cage shaft, and it was timbered from the bottom of the skip shaft to the top of the cage shaft. The ladderway in the cage shaft was on the west side of the shaft. In order to go from the surface to the bottom of the mine, one would have to go down in the skip shaft to the seventh level, then through the cross-cut on the seventh to the top of the cage shaft, and then down the cage shaft to the ninth level or bottom of the mine, and there was no other way of getting out of the ninth level, except through the cage shaft and through the skip shaft.

Defendant was working the mine day and night shifts, and about 35 to 40 men worked on each shift. They used candles for light; the mine having no electric lights. They had air compressors for running drill machines, but none for furnishing air, and there was a down draft in the mine, so that if there was smoke on the seventh level it would descend to the ninth. It would take an ordinary man from 10 to 15 minutes to climb from the ninth to the seventh level, and about 30 minutes to climb from the seventh level to the surface of the mine on the ladders, and about 1½ or 2 minutes to pull a skip load of men from the seventh level to the surface, and about a minute to pull a load from the ninth to the seventh level. The laborers in and about the mine are denominated "miners, timbermen, pumpmen, brakemen, and machinists," and Capt. Webb had full control and management of the mine at that time. On the morning of November 5, 1901, while decedent was engaged in his duties, a fire occurred in the mine, and after the fire was extinguished the next day decedent was discovered about 15 feet from the place where the shaft leading to the ninth level intercepted the cross-cut on the seventh level, lying face down dead. It also appeared that one of the steam pipes had burst, and

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there were indications that decedent had been scalded by escaping steam; but whether this was the cause of his death, or whether he was suffocated by smoke in his attempt to ascend from the ninth level, is not apparent.

The declaration contains numerous counts, but it may be said that the negligence imputed to defendant was in not having constantly at the hoisting apparatus at the surface of the mine a man in attendance, so that when signaled from below the skip could be hauled up; plaintiff's theory being that, had the brakeman been at his post of duty, the jury might properly have found that Williams could, by signaling to the brakeman, have been hoisted out of the mine and his life saved. As to the necessity of employing a watchman, it is in evidence that George Sanders, the foreman of the mining crew, was the last man out of the mine on the morning in question; that he searched the mine before he came up; that he went all over the mine; that he did this because that was his duty for the purpose of seeing that everything was all right; and that he left the mine about 5 minutes to 6. It was a small mine, 35 to 40 men working on a shift, and it appears that Sanders performed the ordinary duties that a watchman would perform, and that as a matter of fact an inspection had been made of the mine but a very few moments before the fire broke out, and that no fire was discovered. It is hardly conceivable that the decedent was not acquainted with the system under which this mine was worked, and the fair inference is that he assumed the risk arising from the absence of any other watchman and of the duties being performed by the shift boss.

The question which seemed to occasion most doubt to the circuit judge was whether the defendant was responsible for the absence of the brakeman from his post of duty on the occasion in question. It is apparently conceded, and is beyond question, that the brakeman was a fellow-servant of decedent, and that recovery cannot be based upon his negligent act. Plaintiff, however, sought to

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show that it was a custom of the company to leave the engine house without a brakeman in attendance on occasions between the hours of 6 and 7 o'clock in the morning and while the pumpmen were at work in the mine. The mine was run on two shifts; an hour intervening between the employment in the mine of the main body of workmen of each shift. In the morning the workmen came up from the mine at 6 o'clock; the day crew taking their place at 7. In the meantime, if timber was to be lowered into the mine, the timber crew was employed during this hour; if not, no one was employed except the brakeman in the engine house. It was sought to show a custom of leaving the engine house without any one in charge during this hour on occasions when there was no timber to be lowered, and it was also contended that the employment of the man Hagerty, who was the brakeman on the morning in question, was such as to leave him to infer the right to leave his post of duty when no timber was to be raised.

There were two witnesses called upon this point, one Montgomery, and Hagerty, the man in charge of the engine house. The witness Montgomery testified that the workmen who were working usually quit each morning when there was no timber, and also that he had heard the brakeman ask Capt. Webb if that was all, and that the captain told them it was, and of course they would go; but on further examination this witness testified:

"The practice was for the brakemen to work until 7 o'clock. I couldn't say that I was ever present when the night brakemen quit before 7 o'clock in the morning. I do not know whether there was any custom previous to the 1st day of November, 1901, at the engine house in regard to brakemen quitting when there was no timber to be lowered. * * *

"*Q.* What were they referring to when they said 'was that all?' * * * What would the brakeman do then?

"*A.* Go home, I suppose. * * * He [Capt. Webb] went to work in the morning long about 7 o'clock. It would be pretty close to that. I didn't say I heard these conversations between Capt. Webb and the brakemen in the morning at all. He was supposed to quit at 6 o'clock.

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It would be after 6 that I heard those conversations. * * * The custom was to stay until the hour; that is, the man would go on at 7 o'clock and work till 6. That was the ordinary course. They had timber to go down mostly all the time; very seldom they didn't have timber to go down between 6 and 7, or between 12 and 1. I couldn't say how often that happened during the three months previous to this accident.

"*Q.* You couldn't say it happened at all within three months?

"*A.* I couldn't say as to that. I couldn't say as to whether or not the brakemen, sometimes, by an arrangement between themselves the one who was to come on for night shift, come on a few minutes before the regular time to relieve his partner, or as to whether or not the man who was to come on for the day shift came on a few minutes earlier so as to relieve the man who had been on the night shift. I don't know on how many occasions I heard this conversation between the captain and the brakemen.

"*Q.* There was only two classes of men that worked in the mine 12 hours; that is, the pumpmen and the brakemen?

"*A.* Well, I don't know about the timber gang how long they worked. I understood that the pumpmen and the brakemen worked 12 hours to the shift; that was the general understanding—what I understood. When they were hoisting the brakemen were always there.

"*Q.* Now, can you tell me on some occasion when a brakeman left his machinery before his partner got there to take his place?

"*A.* I could not.

"*Q.* You can't tell me that ever occurred, can you, to be able to swear to it?

"*A.* No, sir, I wouldn't say that at all."

Taking the testimony of this witness as a whole, it is clear that he is not able to testify to any case in which the brakemen were directed or permitted to leave by the captain.

The witness Hagerty, on his direct examination, testified as follows:

"That custom was that we were to lower timber if they wanted us to lower timber between hours, and if they

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didn't it was an understanding we should go home. * * * Capt. Webb never told me I could leave there before 7 in the morning. Nobody in authority ever told me that. During the three months or such a matter that I worked there before this accident to Mr. Williams, I had not left the machinery before the opposite man on the shift came only once. That's all I could remember of in three months. * * *

"Q. Are you positive there was no other occasion you left before your partner came?

"A. That is when I was night shift? No, I can't remember. I don't remember when I was on the day shift of any time when I left before the man who was to relieve me came. There may have been once or twice.

"Q. You can't swear to that?

"A. I can't say that there was or wasn't.

"Q. And, if you did so, you had no authority from any one who had control over the matters?

"A. Had no authority to leave. I took it we had authority.

"Q. You took it so?

"A. Yes.

"Q. But Capt. Webb never told you to?

"A. No.

"Q. Nor Mr. Barber didn't?

"A. When Mr. Barber put me in there—

"Q. Let me ask you the question: Did Mr. Barber tell you that, that you could leave before the man came on to relieve you?

"A. No, he didn't put it that way. * * * He said, 'You go in there,' and I was to get $2.25 a day, and I was to stay there between hours and lower timber, if they wanted me. That's exactly the words, as near as I can come to them.

"Q. He never told you to leave there when there was not timber to be lowered?

"A. No, sir.

"Q. You understood your regular hours were to be there until the man came to relieve you?

"A. If there wasn't timber to be lowered.

"Q. And that was an understanding you got from what was said?

"A. Yes, sir.

"Q. And there was no understanding what you were to do, if there was no timber to lower, by Mr. Barber?

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"*A.* No, sir; he didn't mention it. * * * The only reason for me leaving that morning was because there wasn't any timber to go down, and because of this conversation that occurred between me and the other brakeman.

"*Q.* And that's the only reason you left?

"*A.* I wasn't notified to stay there unless there was timber to go down.

"*Q.* And you took the matter in your own hands to go away without any authority or anything from anybody?

"*A.* I don't think I had any authority. I did it without any authority.

"*Q.* And you didn't do it before.

"*A.* I don't know that I ever had a chance. I don't know if I did have authority."

It is contended by the plaintiff that this conversation between Mr. Barber and Mr. Hagerty was open to the construction that Hagerty was only to remain during the hour from 6 to 7 in case there was timber to be lowered. In view of the nature of his employment, and with the testimony that the shift was a 12-hour shift, and in view of the knowledge which he must have had that men were employed in this mine, and that one purpose of his attendance at this engine house was to be able to bring them up when a call was made, it is simply incredible that he could have understood that he was at liberty to leave his post of duty with these men in the mine. His own testimony shows that he did not rely upon the conversation with Barber as a justification for leaving his post of duty, but that the only reason on that morning was because of the conversation which had occurred between him and the other brakeman. We do not think the conversation was open to the inference that is now sought to be put upon it, and it results that there is nothing to raise an issue of fact in the case as to whether this accident occurred by reason of the default of this fellow-servant of the decedent.

The circuit judge on this ground directed a verdict for the defendant, and the judgment will be affirmed.

McALVAY, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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PRATHER ENGINEERING CO. *v.* GENESEE CIRCUIT JUDGE.

COURTS — JURISDICTION — PRIORITY — MORTGAGE FORECLOSURE — MECHANICS' LIEN.

Where, subsequent to the filing of a mechanics' lien on certain physical property of a railway company, but prior to the filing of the bill to enforce it, a bill to foreclose a mortgage on the entire property of the company was filed in another county, in which the company possessed only franchise rights, the filing of the foreclosure bill gave the court of the latter county exclusive jurisdiction of the entire controversy, including the rights of the lien claimant.

Mandamus by the Prather Engineering Company and J. H. Kusell, trustee, to compel Charles H. Wisner, circuit judge of Genesee county, to vacate an order denying a motion to make a receiver a party defendant to a cause pending in another county. Submitted May 18, 1907. (Calendar No. 22,256.) Writ denied July 1, 1907.

Keena, Lightner & Oxtoby, for relators.

Rundell & Stockton and *Brown & Farley* (*Alex. J. Groesbeck* and *Edwin Henderson*, of counsel), for respondent.

PER CURIAM. Application for a writ of mandamus requiring respondent to grant leave to relators to make the Detroit Trust Company, receiver of the Detroit, Flint & Saginaw Railway, defendant in a cause pending in the circuit court for the county of Saginaw, wherein relators are complainants and the Detroit, Flint & Saginaw Railway, Detroit Trust Company, and others, are defendants. The Detroit, Flint & Saginaw Railway was organized under the train railway act for the purpose of constructing and operating a line of railway from the city of Saginaw to the city of Flint, and also a branch line to the village

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of Vassar. On the 30th day of January, 1904, the railway company executed a mortgage to the Detroit Trust Company, as trustee, covering all of the property, of every kind and description, which the railway company then had or might in the future acquire. This mortgage was duly recorded in the counties of Saginaw, Tuscola, and Genesee. Previous to January, 1906, the Prather Engineering Company and its assignors had, under a contract with the railway company entered into subsequent to the execution of the aforesaid mortgage, constructed and equipped a power house for the use of the railway company in the village of Bridgeport, Saginaw county. On January 9, 1906, the engineering company filed a mechanic's lien upon the power house plant and took proper statutory proceedings to perfect that lien. On November 20, 1906, the Detroit Trust Company filed its bill of complaint in the circuit court for the county of Genesee to foreclose the mortgage above referred to, making the engineering company and its subcontractor, the Harrisburg Foundry & Machine Works, defendants among others. On the date last mentioned the Detroit Trust Company was appointed receiver of said railway's property. On the 8th day of January, 1907, the Prather Engineering Company and J. H. Kusell, trustee, filed their bill of complaint in the Saginaw circuit court, in chancery, to enforce the mechanic's lien aforesaid, making the Detroit Trust Company, as trustee, the said railway, and others, defendants; but the said receiver was not made a party because, as stated in the petition, "your petitioners did not regard said Detroit Trust Company, as receiver, a necessary party to its proceedings, * * * and as the bill of complaint was not ready for filing until the 8th day of January, 1907, it was impossible for petitioners to make a proper motion in the Genesee circuit for leave," etc., "within the time limited by statute for the filing of a bill of complaint to enforce said mechanic's lien." On January 22, 1907, the Detroit Trust Company, as trustee, and the railway company, pleaded the failure to make the receiver

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a party, and such plea was sustained February 25, 1907, with leave to apply to the Genesee circuit court, in chancery, for leave to make the receiver a party. On February 26, 1907, relators applied to respondent for leave to make the receiver a party to the Saginaw suit, which application was denied on March 11, 1907. On March 19, 1907, the Prather Engineering Company appeared generally in the suit in the Genesee circuit. On April 9, 1907, the said engineering company filed its plea to the jurisdiction of the Genesee county court, setting up the mechanic's lien proceedings in Saginaw county. On the 15th day of April, 1907, the court overruled the plea, with leave to answer within 30 days. The Harrisburg Foundry & Machine Works answered the foreclosure bill, and, claiming the benefit of a cross-bill, asked for affirmative relief, praying that it be decreed to have a prior lien over the trust company, the Prather Engineering Company, and the other defendants, for engines and machinery furnished for said power house to the amount of $10,997.40.

The principal business office of the railway company was in the city of Saginaw, and it had about 12 miles of road constructed in Saginaw county. It owned no land outside of that county. The property of the railway company outside of Saginaw county consisted of certain privileges, rights, and franchises in and from the city of Flint, the village of Clio, and the townships of Vienna, Thetford, Genesee, and Mt. Morris, in Genesee county. Judge Gage was of the opinion that under the decisions of this court (see *Burk* v. *Foundry Co.*, 98 Mich. 614; *Earle* v. *Humphrey*, 121 Mich. 518) the receiver was a necessary party to the suit before his court; but he said:

"The court is satisfied this is the proper court in which to enforce a lien, and that another circuit outside of this is not the proper one in which to enforce a lien."

On the other hand, Judge Wisner held that he had exclusive jurisdiction over the entire subject-matter of the mortgage foreclosure, including the interests of lienors in

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other counties, and that the interests of all parties must be determined in the foreclosure suit. It was upon this ground, largely, that he denied the application for leave to make the receiver a party.

We are of the opinion that the Genesee circuit court, in chancery, by virtue of the foreclosure proceedings, acquired exclusive jurisdiction of the entire matter in controversy, including the rights of the Prather Engineering Company, if any, acquired under the mechanic's lien proceedings, and that such rights may properly be asserted by answer and determined in that court. *Campau* v. *Driving Club*, 130 Mich. 417; *McKay* v. *Van Kleeck*, 133 Mich. 27; *Wells* v. *Montcalm Circuit Judge*, 141 Mich. 58; *Convis* v. *Insurance Co.*, 127 Mich. 616; *Koch* v. *Sumner*, 145 Mich. 358.

Writ denied, with costs, with leave to relator to answer within 20 days from the filing hereof.

NOLAN *v.* GARRISON.

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APPEAL AND ERROR—CHANCERY APPEALS—SETTLEMENT OF CASE—TIME—STATUTE—COURT RULES—CONSTRUCTION.

Act No. 129, Pub. Acts 1905, does not, by reference therein to Circuit Court Rule No. 47, limit the time for making and settling a chancery case for appeal to the time provided by said Rule 47, but the statute expressly grants three months in which to make and file a case, and gives the circuit judge authority to extend the time without cause and without notice to a time not exceeding six months after the entry of the decree.

Bill by Frances A. Nolan against John W. Garrison

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and others for an accounting, and to set aside certain deeds. From a decree for complainant, defendants appeal: On motion to dismiss said appeal. Submitted June 4, 1907. (Calendar No. 22,239.) Denied July 1, 1907.

Walker & Spalding, for the motion.

Edward McNamara (*H. Geer*, of counsel), contra.

CARPENTER, J. This is a motion to dismiss an appeal from a decree rendered by the circuit court in favor of complainant. The decree was entered October 8, 1906. Claim of appeal was filed October 16, 1906. On January 4, 1907, the circuit judge, without any cause being shown therefor, extended the time to settle the case on appeal for six months from the entry of the decree. The case on appeal was settled, signed, and filed April 6, 1907.

Appellee moves to dismiss the appeal on the ground that the order made January 4th by the circuit court extending the time to settle the case was unauthorized and void. He contends that according to the proper construction of Act No. 129, Pub. Acts 1905, the time to settle the case for appeal is determined by Circuit Court Rule No. 47, and that, according to this rule, an order extending time to settle a bill made more than 80 days after judgment, without good cause shown, is void. See *Hayes* v. *Ionia Circuit Judge*, 125 Mich. 277; *Lake Shore, etc., R. Co.* v. *Branch Circuit Judge*, 116 Mich. 399. We do not question appellee's construction of Circuit Court Rule No. 47, but we do question his claim that the time to settle the case for appeal is determined by said rule. Act No. 129, Pub. Acts 1905, providing for chancery appeals, reads:

"That in all cases, whether the same shall be so tried in open court or the testimony shall have been taken by deposition, or before a circuit court commissioner, either party shall be entitled to make and settle a case, setting forth in substance all the evidence taken or read at the

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hearing, following as far as practicable the making of cases for review at law, before the judge who tried the same, at such time and in such manner as is now provided by rule for the settlement of bills of exceptions in cases at law. * * * And such case so made and filed within three months after the entry of the final order or decree therein shall be deemed and held to be the evidence therein for all purposes of review on appeal to the Supreme Court. *And provided further*, That the judge who tried such case, or any other circuit judge holding such court, may grant an extension of the time for making and filing such case for a period not exceeding six months from and after the date of the entry of such decree or final order."

Then follows a further provision authorizing the circuit judge "on special motion and due cause shown * * * to grant an extension of the time for making and filing such case for a period not exceeding one year."

Appellee's contention that Circuit Court Rule No. 47 fixes the time for settling a case upon appeal is based upon the language of that part of the statute first above quoted. If this contention is correct, if the time prescribed in Circuit Court Rule No. 47 is the time in which a case for appeal in chancery must be settled, 20 days, and 20 days only, is allowed, and this time may be extended without cause shown 60 days, and no more. But the statute in clear and in express terms grants three months in which to make and file said case. It also gives the circuit judge authority to extend said time for a period not exceeding six months, and this authority it is clear may be exercised without cause being shown and without notice; for it is expressly provided that upon notice and cause shown the time may be extended for a period not exceeding one year. The construction contended for by appellee would therefore nullify the express provisions of the statute, and cannot be adopted. What did the legislature mean by the language of the statute first above quoted, that in preparing the case made the party should follow "as far as practicable the making of cases for review at law * * * at such time and in such manner as is now provided by

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rule for the settlement of bills of exceptions in cases at law?" This question is not so easily answered; but this is obvious—and this disposes of appellee's contention—that the language must receive a construction in harmony with the other provisions of the statute which give three months to settle the case and give authority to the circuit judge to extend this time to six months. It is to be suggested that the first portion of the statute—the portion upon which appellee relies—relates to the manner of preparing the case made and the method of presenting it to the judge, and it seems quite probable that the reference therein to time relates to the time of presenting said case to the circuit judge. A construction according to this suggestion would give effect to the words "at such time." It would require the proposed case to be presented to the trial judge at the time specified in a notice, which, together with a copy of said proposed case, was served upon the opposing party "at least four days before the time for such settlement." See Circuit Court Rule No. 47, subd. *f*.

Appellee relies upon other grounds. They are not meritorious, and do not demand discussion.

The motion to dismiss is denied.

MCALVAY, C. J., and GRANT, BLAIR, MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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DRAKE COAL CO. *v.* CROZE.

SALES—ACTION FOR PRICE—CONTRACT—BURDEN OF PROOF.

Where, in an action on the common counts for goods sold and delivered, defendant gives notice of recoupment, alleging that the goods were delivered under an agreement that plaintiff was to deliver a larger quantity, which he did not do, the issue to be tried is: What was the contract? and the onus of proving his contract is upon the plaintiff.

Error to Houghton; Streeter, J. Submitted June 4, 1907. (Docket No. 3.) Decided July 1, 1907.

Assumpsit by the Drake Coal Company against Joseph Croze for goods sold and delivered. There was judgment for plaintiff, and defendant brings error. Reversed.

Plaintiff brought suit to recover the price of a cargo of coal sold and delivered by it to the defendant. The declaration was on the common counts in assumpsit for goods sold and delivered. Defendant with his plea of the general issue gave notice of recoupment, alleging that the coal was delivered under an agreement that the plaintiff was to deliver not less than 4,000 tons of coal during the season of 1902. Plaintiff proved the delivery, receipt, and the price. These the defendant apparently admitted. The defendant gave evidence that the coal delivered was received as a part of a contract as set forth in his plea. The court instructed the jury that the burden of proof was upon the defendant to sustain his version of the contract, and that presents the sole question in the case.

Chadbourne & Rees, for appellant.

Shelden & Legris, for appellee.

GRANT, J. (*after stating the facts*). There was but

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one contract made between the parties. The coal was delivered under that contract. If the contract included one cargo, the plaintiff was entitled to recover. If the contract included more, and the plaintiff had failed to perform it, then the plaintiff was entitled to recover for the coal delivered less what damages the defendant had sustained by reason of the plaintiff's failure to perform. The defendant did not set up a claim in avoidance of an admitted contract. On the contrary, he denied that any such contract, as the plaintiff claims, was made. The sole issue to be tried was: What was the contract? The onus was clearly upon the plaintiff. *Berringer* v. *Iron Co.*, 41 Mich. 305; *Homire* v. *Rodgers*, 74 Iowa, 395. Cases like *Dillon* v. *Pinch*, 110 Mich. 149, have no application to the facts of this case. There the defendant had received, as agent of the plaintiff, the amount of a policy of insurance. The suit was brought to recover the amount of the insurance received by him. He pleaded the general issue with notice of set-off, claiming an agreement that he was to receive $530 for making the collection. There the defendant introduced a contract in avoidance of the plaintiff's claim.

Judgment reversed, and new trial ordered.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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EIS *v.* CROZE.

1. RELIGIOUS SOCIETIES—FUNDS—OWNERSHIP.
   Moneys accumulated by a voluntary unincorporated club composed of parishioners of a Roman Catholic church, not accumulated for general church purposes, but obtained either for the specific purpose of building a new church, or such other specific church purpose as the membership of the club should determine upon, do not belong to the bishop of the diocese, nor to the church, nor are they subject to their control.

2. SAME—TRUST PROPERTY—DECLARATION—RIGHTS.
   A voluntary committee of men parishioners of a Roman Catholic church purchased a parcel of land for the purpose of providing a site for a new church building and took the title in the name of one of themselves, who executed a declaration of trust providing for the transfer of the property to the bishop of the diocese on payment by or for the church within three years of the money advanced. A club of the women parishioners contributed funds not belonging to or under the control of the church or of the bishop on the agreement that they were to have a half interest in the property, subject to the terms of the declaration of trust. The church declined the offer of a site and built elsewhere. *Held*, that the bishop could predicate no rights to the men's half interest in the property on the action of the women's club.

3. EVIDENCE — PAROL EVIDENCE — VARYING WRITING — COMPETENCY.
   On a bill by the Roman Catholic bishop of a diocese to enforce specific performance of a declaration of trust in certain real estate, a part of the funds for which were contributed by a voluntary club of the parishioners of the parish, parol evidence that the property was purchased by the trustee and others for the purpose of providing a site for a new church building is competent for the purpose of determining the legal effect of the action of the club.

Appeal from Houghton; Streeter, J. Submitted June 4, 1907. (Docket No. 4.) Decided July 1, 1907.

Bill by Frederic Eis, Roman Catholic bishop of the

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diocese of Sault Ste. Marie and Marquette, against Joseph Croze and others to enforce the specific performance of a declaration of trust. From a decree for complainant, defendant Croze appeals. Reversed, and bill dismissed.

Lewis N. Legris, for complainant.

Chadbourne & Rees, for appellant.

BLAIR, J. Complainant filed the bill of complaint herein to enforce the specific performance of a declaration of trust executed by the defendant Croze on the 4th day of April, 1893. The instrument declaring the trust, after reciting the purchase of certain real estate subject to certain liens and payment therefor with the proceeds of a note signed by Croze and indorsed by the other defendants, contains, among other provisions, the following:

"Now I, the subscriber, do hereby declare and make known that the said property is held by me in trust for the following uses and purposes, and with the following powers vested in me as such trustee and by virtue of this instrument expressly reserved to myself, namely:

"*First.* The property above described shall be held in trust as security for the payment of the said note discounted as aforesaid, and the interest thereon, or for the payment to the subscriber and the said indorsers of any sum or sums which they or any of them shall pay by reason of the said note, or by reason of the making and indorsement of the same, or of any renewal or renewals of the same or any part thereof, and of any sum or sums which they or any of them shall pay as interest on the same, and of any sum which they or any of them shall pay for the purpose of perfecting title to said property or for removing the liens therefrom, and until said sums and said note shall have been fully paid.

"*Second.* Upon the full payment of the several sums mentioned in the foregoing paragraph by or on behalf of the St. Ignatius Church Society of Houghton, Mich., within the period hereinafter mentioned, but not thereafter, except at the option of said trustee and said indorsers, the said property is to be conveyed by the said trustee to the Right Reverend Bishop Vertin, or his successor, for the use of the said church society.

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"*Third.* After the expiration of three (3) years from the date of this declaration of trust, if within that time the said church society shall not have fully paid said amounts as mentioned in paragraph first, then the said trustee shall have, and hereby reserves and retains, the power and right, with the consent or request of a majority of said indorsers, including himself, to sell said property and to convey the same to such person or persons, and upon such terms as they shall deem proper. The proceeds of such sale to be applied as follows:"

This instrument was duly recorded, but was not delivered, being retained by defendant Croze. The circumstances leading up to the purchase of the property and the execution of the declaration of trust were, briefly, as follows: The society was contemplating the erection of a new church edifice, but the parishioners were not agreed as to the location of the new building. Father Manning, the then parish priest, the defendants, and others, were in favor of locating the building on the property in question. Others, and, as it afterwards developed, a majority, were in favor of locating the new building upon or near the old site. The defendants, for the purpose of procuring the location of the church upon the new or downtown site, organized themselves into a voluntary and unofficial committee, purchased the land in question, and caused the conveyance thereof to be made to the defendant Croze.

"The committee of men belonging to St. Ignatius congregation were anxious to have the church built on the main street, and that property was purchased for that purpose. * * * It was with the end in view of getting this property for the new church. The indorsers on the note at the time were Mr. Croze, with the parties that were representing the crowd that wanted a church down town."

The original loan was $2,389.92, increased in May, 1894, to $3,030.46. The principal source of revenue of the committee was the rent from the property. May 2, 1894, the committee borrowed $1,000 of the lessee of the property, for the purpose of making repairs, upon the note of Joseph Croze, trustee, indorsed by others of defendants.

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This note was paid in rent, and, until paid, the revenue from rents ceased. In the summer of 1894, the committee applied to an association of ladies of the church for assistance. These ladies were associated under the name of the "No Name Club" at one time; of the "Harmony Club" at another time. The nature of the association, its relation to the church, to the men's committee, and to the property in question, are stated by Mrs. Edwards, a member of the association, at the close of whose testimony it was stipulated that the other members would testify substantially the same. The following extracts from Mrs. Edwards' testimony will sufficiently disclose the association's attitude and legal relations to the property and church society:

"I was a member of the club known as the 'Harmony Club.' I think the club was organized in 1891 or 1892, but I am pretty certain it was 1891. I was a member from the time it was organized. * * * They came to us with the proposition to take us in with them in the association. I don't know what you would call it. They wanted funds to pay the interest on these notes that they had given for this property at the foot of the hill, and it seems to me that they had no money to meet the claims, as I understood it then, and as I understand it now. The money to repair that house after the fire was money that was borrowed from Mrs. Fish (Mrs. Poisson), and she was to pay no rent until that $1,000 was reimbursed to her, and there was no rent coming in to pay the interest on these notes, and they had no way of reducing it without the rents, and they came to us with the proposition to come in with them and let us pay the claims of the property. At that time we had considerable money in the club fund. I think it was in the neighborhood of $700. * * * After we had agreed to the proposition, all money that came from the rental of the property and all the money that had been made from entertainments and monthly dues went into the treasury of the Harmony Club and were paid to the treasurer, Mrs. Dube, and that money was used to pay all claims against this property at the foot of the hill, to pay the interest on notes and taxes, and reduce the principal. At least that is how I understand

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it. That has been done ever since we went into the club, since 1894. * * * The money that was realized out of those picnics and socials was turned into the same general fund as all the others, turned into the treasury of the Harmony Club and used for the same purpose, as far as I am aware. * * *.

"*Q.* As to the object for which this property was purchased?

"*A.* When it was bought first, I think the understanding was that the new church was to be put on there. The proposition was Father Manning's. The gentlemen backed him in it, but he thought it was a good proposition for the church, providing we bought Dick Lang's or this property; but at the same time he thought the property was worth the price that was paid for it at any time. * * *

"*Q.* Were you led to believe by the action of the men, Mr. Croze and Mr. Fox, that this property would be turned over to the church when they were requested to do so?

"*A.* I never had any conversation with them. I don't think they led me to believe it or not to believe it. I think the formal organization of the Harmony Club with a constitution and by-laws was in 1894, but we had a club in existence that was practically the same club, known as the 'No Name Club.' It was a ladies' society at first without any formal rules or specific objects. I think it had a constitution and by-laws. It was so organized that we had regular meetings and kept records of the club. I think that was true before 1893, but I couldn't swear. * * * That is a copy of the original constitution of the club under the name of 'No Name Club.' I think it was the No Name Club in 1891. I didn't think it was dated 1894. Later the name was changed to the 'Harmony Club.' I think there was no other change in the reorganization except the change of name. I think this is a copy of the original 'No Name' constitution."

Sections 2 and 5 of the constitution are as follows:

"SEC. 2. The object for which it is formed is the promotion of sociability; unity and thorough Christian charity among its members; friendship in assisting each other by every honorable means; unity in associating together for mutual support in sickness as well as enjoyment while in good health; true Catholic charity in doing to each other as we would have others do unto us.

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"SEC. 5. In case of an appropriation of money for charitable, benevolent, fraternal or extraordinary purposes, other than for paying the common or running expenses of the club it shall be the duty of the member asking for such appropriation to notify the president and secretary at least fifteen days before the next regular meeting of her intention, and it shall be the duty of the president and secretary, either verbally or in writing, to notify, previous to the meeting, all members of the club in good standing that such demand will be made and to determine such appropriation, the concurrence of three-fourths of the valid votes cast shall be necessary. Whenever all these conditions are not strictly complied with, the president, secretary and treasurer are enjoined not to issue an order or to pay over the amount of the appropriation, and if they do so, it shall be at their own risk and peril."

Mrs. Edwards further testified:

"I think it was in 1894 that an arrangement was made by which the Harmony Club became interested in this property, and from that time the club paid certain moneys on account of the indebtedness on this property at various times, and continued to do so, as far as my knowledge goes, until last May, a year ago. The Harmony Club also spent money for other purposes, as I recall, twice. The first time as an appropriation to pay for the furnace that was put in the parsonage. I think it was $70. The second time was a check that was sent to Father Rezek when he was away and ill in the hospital; $100, if I am not mistaken. There was also an appropriation towards the purchase of a window. That was $500. Those moneys came out of this same fund. The by-laws, I think, provided for the authority. We discussed the question of paying for the furnace and voted upon it, and it was decided to pay it. It was a vote of the Harmony Club. The moneys belonged to the Harmony Club until they appropriated them to any different use we saw fit. I couldn't say if the St. Ignatius Church Society as a society would have no right to control those funds without the consent of the Harmony Club. We had never given them the right to control the funds, but the right was taken away. * * * In the organization of the club, no one but the members had authority to direct what to do with the money. * * * I don't think they had the right to appropriate money for any purpose the

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club saw fit. It wasn't the intention of the club to work for any charitable purpose. * * *

"*Q.* At the time it was first arranged that the ladies should assist in raising funds and should apply those funds towards the expense of this building, it was understood to be the desire of the people interested that the building of the new church should be put there, was it not? * * *

"*A.* Yes, the new church was spoken of as being put there. I don't know if it was before the decision had been made by the church society as to the location of the church. I don't know when the decision was reached. Between Father Manning's time and down to the time that Father Rezek came, there had been no decision on the location of the church. That matter was decided after Father Rezek's incumbency, and the decision was that the church should be put where it stands today, in the neighborhood of its old location on the top of the hill. I don't remember when that action was taken by the church society. It was a formal action by vote of the parishioners. I think the trust deed to Mrs. Hennes was drawn up in March, 1895. That was before Father Rezek came here, and must have been before the location of the church was decided. The date of the trust deed to Mrs. Hennes was June 29, 1895. [Referring to paper.] Mrs. Hennes took that as trustee for the Harmony Club, and in no other capacity. I don't know that it was given to secure what we had paid out. I thought we were promised an undivided half interest in the property, and I supposed that was the reason that it was given. * * * There was a good deal of discussion in the Harmony Club as to the disposition of their funds, the eventual disposition of this property, during the past few years. There was no division among the majority of the club. We had the one purpose in view. There was perhaps one or two objected to its going to the church. They objected to Father Rezek handling it. Any other priest could handle it. We all expressed a preference for putting it in an altar, but the money would have been given to the priest and let him order the altar. There were a few that proposed that the money should be spent directly by the ladies; that they should determine what it should go into. For a long time it was a matter of discussion in the club. The final action as to the disposition of the interest of the club in the property was taken last fall, I think,

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very recently. That was done by a vote of the club, to turn the property over to the bishop or the church society. Up to that time no determination had been come to permanently. That action was taken at a meeting of the club and was voted on. * * * That action of the club resulted in something of the nature of a quitclaim deed to Bishop Eis of our interest, whatever it would be, which was supposed to be, or which I supposed was an undivided half interest. That was the end of the connection of the Harmony Club with this property. Before that action was taken resulting in the conveyance to the bishop of the interest of the Harmony Club to the property, there had been for a long time a discussion among the members of the club as to what to do with it. Among other things discussed was whether we would sell our interest to Mr. Croze or to anybody who would buy it. The discussion went so far as to fix the price we would take for our interest, and that was with the idea of converting our interest into money and then using our money in such a way as we saw fit for some church purpose. * * * This deed or declaration of trust that was given to Mrs. Hennes as trustee was to give us a half interest by reason of the moneys we had paid and were paying. So far as the Harmony Club was concerned, that was all the interest we have had, and up to the time that interest was transferred to the bishop, it belonged to the Harmony Club as a club. I don't think that the public understood that the picnics and entertainments were for the Harmony Club. I don't think that most people that attended understood it that way. They thought we were working for a new church, and what money they gave went for a new church. I think the general public thought the proceeds went into the general fund of the church, because I don't think they discriminated or asked any questions what we did with the money, except we were working for a new church. We told people we were working for a new church. It was for that particular purpose, for a new church. After the site of the church had been decided upon, I am not aware that there was any change in the workings of our club, collecting the money and turning it over to the bank or to our treasurer. We gave socials and picnics in the same way after that as before. The intention of the club was not for any charitable purpose. The intention was for a new church from the very start. * * *

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"*Q.* Will you state whether or not that constitution expressed the intention of the club, as written by Mr. Wieber?

"*Mr. Rees:* Objected to as immaterial and as trying to vary the terms of a written instrument.

"*A.* No, it did not express the intention of the club. * * * It was Mr. Wieber's proposition to put the purposes of the club as it stands in that constitution that was shown to me. We had had trouble with the priest previous to this time. Some of the ladies of the church had got rather tired of working for a new church, as we had been doing, and then having the money going into the general fund of the church, and then being squandered, and we planned to put whatever money we raised into the bank and used as a nucleus for a new church. We had had one entertainment, and the priest had been to us and wanted to get the money from us, and we had some trouble over it, and we decided to form this No Name Club, and we raised money and deposited it in the bank to the credit of our treasurer, and Mr. Wieber put it in the form of a charitable organization or something of that kind, so that the priest or some other priest might not have any hold upon the money; but the object was understood by every one of us who helped to draw up those by-laws that the money was to go for a church fund. It doesn't state so in the by-laws. It states a benevolent or fraternal organization, but that was the object, a new church fund.

"The deed given by Mr. Croze to Mrs. Hennes was given to her with the understanding that it conveyed an undivided one-half of that property to the club in case the option was not taken up by the church, by the bishop. That is how I understood it. * * * We at one time tried to transfer our interest in this property to Mr. Croze. We offered it to him. We wanted him to buy it, or we wanted to sell to him, or that he sell to us. He made us an offer, I think, of $1,000 for our half interest, which we considered too small and wouldn't accept. I don't think we made him an offer for his portion of it. I don't recall it.

"The real intention of the formation of this club was that it was formally organized so that we could raise money and keep the control of the money ourselves. At least until such a time as we had a priest we could trust, or until such a time as we wanted to let it go. That is

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just what we did; kept the funds or the property in our own hands until last fall, and under our own control. * * *"

Paper offered in evidence, marked "Exhibit F:"

"Mrs. ELIZABETH HENNES,
"Trustee of Harmony Club.

"*Madam:* At a special meeting of the Harmony Club held October 12, 1904, called by order of the president, Mrs. Joe Haas, the following resolution was adopted: Resolved, that the Harmony Club interest in the property known as the Harmony Club property or Michigan House, situated at the corner of Shelden and Portage streets, be transferred to the St. Ignatius Church Society, and you are hereby authorized and empowered to make such transfer."

Signed, etc.

In pursuance of this resolution, Mrs. Hennes, on October 15, 1904, conveyed the undivided one-half interest held by the club in the property to the complainant, "for the sole and only use, benefit, and behoof of the St. Ignatius Church congregation," etc. During the same month the present suit was commenced.

Defendant Croze testified:

"With regard to the instrument of Mrs. Hennes, after consideration about this house and place—we were getting pretty fair rent—I went to the ladies, for I was one of the members of the club, and I made a proposition to them. They had some money, and if they would come in with us for the corner house, that for their money I would give them a deed for half the property. That proposition was accepted by the ladies, and the result of it was the execution of the instrument in evidence. There were no other transactions with reference to the property since then. Nothing in the way of deeds or papers besides that one. That was the final paper. * * *

"From the time that this property was purchased, up to the present time, I haven't put in anything but donations. The donations to the socials, and sometimes my tugs and scows; I would charge them half and sometimes not at all, and sometimes a little; but I never considered I would ask anything. I don't think any cash money has been paid by me in payment of the principal or interest on

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any sum of money borrowed for that property. All the work that was done through my men on that property was paid to me by the Harmony Club. I rendered a bill, and they gave me a check."

Some time in 1902, and afterwards, demand was made of defendant Croze for a deed of the property by the parish priest, acting under power of attorney from complainant, coupled with an offer to pay all demands and charges against the property, in compliance with the declaration of trust. All of such demands were refused.

The bill of complaint was taken as confessed by all of the defendants except Joseph Croze, who alone appeals to this court from the decree granting the prayer of the bill. It is the contention of counsel for complainant that the Harmony Club was a church society organized for the benefit of St. Ignatius Church Society; that the moneys raised by the club constituted a trust fund for the use and benefit of St. Ignatius Church Society, and therefore belonged to and were subject to the control of complainant; that the moneys belonging to complainant for the use and benefit of St. Ignatius Church Society, and having been paid by the Harmony Club in the discharge of obligations created by the purchase of the property and covered by the declaration of trust, were payments "by or on behalf of the St. Ignatius Church Society," under the provisions of such declaration.

It is apparent, we think, from the record, that the men's committee purchased the property in question for the purpose of providing a site for the new church building, that they solicited the aid of the ladies' society for that purpose, and that the ladies so understood. It is also clear that the moneys accumulated by the No Name or Harmony Club were not accumulated for general church purposes, but were obtained either for the specific purpose of building a new church, or for such other specific church purpose as the club members should determine upon. The funds in the club treasury did not belong to the complainant, nor to the St. Ignatius Church Society,

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nor were they subject to their control. The club members, who, by their energetic, unselfish, and intelligent efforts, had accumulated the fund, had a right to determine the church purpose for which it should be used. *Amish* v. *Gelhaus*, 71 Iowa, 170.

The club united with the defendants in purchasing the land in question for the purpose of providing a site for the new church, if the church society concluded to accept the offer. The purpose of the club members was the same as the purpose of the men's committee in making the original purchase, and they no more represented the complainant or the church society in their dealings with the property than did the men's committee. By the agreement of June 29, 1895, the club, through its trustee, Mrs. Hennes, became entitled "to an undivided one-half interest in and to" the real estate, subject to the terms and conditions of the declaration of trust. Some time after the club acquired written evidence of its interest in the lands, the church society determined to locate the new church upon the old site, and not to accept the lands in question for the purpose for which they had been purchased. This action of the church society was equivalent to notice to the trustee and the club that the society did not desire the property for the purpose for which it was acquired. The exact time of this action does not appear, but it must have been later than November, 1895, when Father Rezek became pastor. A few months later, the time expired within which, "but not thereafter, except at the option of said trustee and said indorsers, the said property is to be conveyed," etc. No steps were taken by the church society or complainant during the prescribed period, nor for six years thereafter, to comply with the provisions of the declaration of trust, or even to notify the trustee that they considered it in force, and the record discloses no waiver of his rights on the part of the trustee. The payments which were made by the club after the expiration of the three years were made in pursuance of their original understanding embodied in the written agreement that they were to have an undivided half interest in the property.

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"The deed given by Mr. Croze to Mrs. Hennes was given to her with the understanding that it conveyed an undivided one-half of that property to the club in case the option was not taken by the church, by the bishop."

The church, or the bishop, did not take up the option, and the undivided one-half interest of the club in the real estate, representing its payments, has been conveyed to the complainant, which counsel for defendants concede he is entitled to hold.

The complainant can predicate no rights upon the action of the Harmony Club, so far as the performance of the trust conditions is concerned, and the failure of performance on his part deprives him of the right to call for performance on the part of the trustee. The testimony as to the purpose for which the property was purchased was objected to as tending to vary the terms of the declaration of trust. Without determining whether this objection is valid in a case like this, where complainant can only hold real estate "for charitable, religious, and literary purposes, or for burial grounds" (3 Comp. Laws § 8310; *Thompson* v. *West*, 59 Neb. 677 [49 L. R. A. 337]; *First M. E. Church of Chicago* v. *Dixon*, 178 Ill. 260), we are of the opinion that the evidence was competent for the purpose of determining the legal effect of the action of the Harmony Club.

The decree of the circuit court is reversed, and the bill of complaint dismissed, with costs of both courts to defendant Croze.

CARPENTER, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

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WOLF v. GRAND RAPIDS, HOLLAND & CHICAGO RAILWAY.

1. CARRIERS—BAGGAGE—LOSS—ACTION—EVIDENCE.
   In an action against a carrier for the loss of baggage, testimony of its transfer agent that he delivered the baggage at defendant's freight depot is sufficient to prove that the baggage was placed in the custody of defendant.

2. SAME—CHECKING BAGGAGE—AUTHORITY OF AGENT.
   That the carrier's agent checked plaintiff's baggage before plaintiff had procured his ticket for passage, in disobedience of instructions, is immaterial on the question of responsibility for the baggage, where plaintiff subsequently procured tickets.

3. SAME—BAGGAGE—LIABILITY OF CARRIER.
   A carrier is liable for the loss of a passenger's baggage properly checked unless lost by the act of God or the public enemy.

4. SAME—FORM OF ACTION.
   That a passenger bringing an action against a carrier for the loss of his baggage declares in case rather than assumpsit does not affect the liability of defendant, nor require plaintiff to show negligence.

5. SAME—CONNECTING CARRIERS—PARTNERSHIP—JOINT LIABILITY.
   Where a railroad company and a steamship company advertised a through line between two points, and had a common agent who sold through tickets, and another who checked baggage through, there were circumstances to warrant the inference that they were partners in the business of carrying passengers and baggage between those points, and were therefore jointly liable for the loss of baggage so checked.

Error to superior court of Grand Rapids; Stuart, J. Submitted June 4, 1907. (Docket No. 8.) Decided July 1, 1907.

Case by David Wolf against the Grand Rapids, Holland & Chicago Railway and the Graham & Morton Transportation Company for the loss of certain baggage. There was judgment for plaintiff, and defendants bring error. Affirmed.

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Diekema & Kollen, for appellant railway.

Grant Newell, for appellant transportation company.

G. A. Wolf, for appellee.

CARPENTER, J. The defendant railway company operates an interurban railway from Grand Rapids to Holland, and the defendant transportation company operates a line of boats from Holland to Chicago. In the summer of 1906 these two defendants made an arrangement by which passengers and their baggage were carried from Grand Rapids to Chicago; being carried by the railway company to Holland and by the transportation company from that point to Chicago. They advertised this route as the "Grand Rapids Chicago line. Fare two dollars. Baggage checked through." July 27, 1906, plaintiff, his wife, and two children took this trip. He bought through tickets for the four. Before buying them, a transfer agent came to his residence and checked his baggage through to their destination. This baggage was never delivered, and, though plaintiff made repeated demands, no explanation was ever afforded him. He brought this suit, and recovered a verdict and judgment against both defendants.

We are asked to reverse this judgment upon several grounds, all of which relate to the proposition that the trial court should have directed a verdict in defendants' favor.

First. It is contended that there is no testimony tending to prove that the baggage ever came into the custody of either of the defendants. This contention we answer by saying that there is such testimony. That testimony was given by the transfer agent. He testifies:

"These trunks I delivered at the freight depot before 6 o'clock. If I remember right, this trunk was delivered at the freight depot before 6 o'clock."

Second. It is contended that the transfer agent had no authority to check the trunks, because at the time he

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checked them plaintiff had not yet procured his tickets. The testimony shows that the transfer agent had authority to check the trunks over defendants' lines from Grand Rapids to Chicago. It is true he was instructed not to check baggage unless the party desiring to have it checked produced a ticket; but this was only an instruction. It was not a limitation of his authority. If plaintiff had not subsequently purchased his tickets, a very different case would be presented. But in this case plaintiff did purchase his tickets, and did thereby entitle himself to all the rights of a passenger, one of which was to have his baggage checked. The fact that the transfer agent disregarded his instructions was an entirely immaterial circumstance; for plaintiff to have insisted upon the baggage being rechecked after he had purchased the tickets—and this was his right and duty according to defendants' contention—would have been an act of sheer folly. By purchasing the tickets plaintiff fully corrected the consequences of the mistake of the transfer agent.

Third. It is contended that there can be no recovery in this case, because plaintiff, having commenced his action in case instead of assumpsit, was bound to establish negligence, and there was no evidence of negligence. Defendants' liability in this case was that of common carriers of goods; that is, they were liable unless the goods were lost by the act of God or the public enemy. See 6 Cyc. p. 662; 3 Am. & Eng. Enc. Law (2d Ed.), p. 546. They do not claim that the loss came within either of these exceptions. Their liability was in no way changed because plaintiff elected to declare in case, instead of assumpsit. 1 Hutchinson on Carriers (3d Ed.), § 204; *Dyke* v. *Railway Co.*, 45 N. Y. 113.

Fourth. It is contended that there was no evidence of such a relation between the two defendants as to make them jointly liable. The evidence proves that the two defendants had entered into an arrangement for carrying passengers and their baggage from Grand Rapids to Chicago. They advertised to the public that they had formed

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a Grand Rapids Chicago line. They had a common agent who sold tickets and another common agent who checked baggage. Their common agent sold plaintiff his tickets and checked his baggage. From these circumstances the jury were warranted in inferring that in the carrying of passengers and their baggage from Grand Rapids to Chicago the defendants were partners, and therefore jointly liable to plaintiff. *Sun Ins. Co.* v. *Kountz Line*, 122 U. S. 583; *Block* v. *Railroad Co.*, 139 Mass. 308; *Wyman* v. *Railroad Co.*, 4 Mo. App. 35; 6 Am. & Eng. Enc. Law (2d Ed.), pp. 654, 655. This case is easily distinguished from *Detroit, etc., R. Co.* v. *McKenzie*, 43 Mich. 609, and *Rickerson Roller Mill Co.* v. *Railroad Co.*, 67 Mich. 110, and from other cases relied on by defendants. In those cases it was held that a railroad company, receiving goods for a destination beyond the limits of its own line, discharged its obligation when delivery was made to the connecting carrier. There the transportation companies did not, as in the case at bar, hold themselves out as united in a joint enterprise.

The judgment is affirmed.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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JEWETT v. NORTHWESTERN NATIONAL LIFE-INSURANCE CO.

1. LIFE INSURANCE—PREMIUMS—TIME OF PAYMENT.
That a life-insurance policy dated August 1st, and providing for payment of premiums on the 1st day of certain months, was not issued until August 18th, does not postpone the time of payment of the subsequent premiums to the 18th of the several months.

2. SAME—FORFEITURE—NONPAYMENT OF PREMIUMS—WAIVER.
Assured, having failed to pay a quarterly life-insurance premium, due August 1st, wrote on October 27th to know how much was due. The company replied on October 31st, stating the amount of the past-due premium with interest, which assured remitted November 4th and the company receipted for November 7th. *Held*, that the action of the company in receiving and retaining the remittance of November 4th was not a waiver of the forfeiture occurring by reason of the nonpayment of the premium due November 1st.

Error to Wayne; Brooke, J. Submitted June 4, 1907. (Docket No. 21.) Decided July 1, 1907.

Assumpsit by Ina L. Jewett against the Northwestern National Life-Insurance Company on a policy of insurance. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

On August 11, 1902, one James H. Jewett, the husband of plaintiff, made application to the Northwestern Life & Savings Company, of Des Moines, Iowa, for insurance upon his life. Mr. Jewett was then a subagent for said company, soliciting insurance in the city of Detroit. The first year's premium ($100) was paid by Mr. Jewett on August 11th. Upon the receipt of the application and the money the policy was issued to Mr. Jewett on August 18, 1902. Mr. Jewett made no further pay-

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ment until November 4, 1903, when, through his wife, he sent a draft for $25.52. On October 27, 1903, Mr. Jewett, through his wife, wrote the company, asking for a statement of the amount of the premium due. The company replied to that letter October 31st, informing him that the total amount due for the delinquent payment was $25, and interest 52 cents. This amount was remitted by letter November 4th. On November 7th the company sent Mr. Jewett a receipt for the money, acknowledging it as the quarterly premium due on the policy August 1, 1903. No further payments of premiums were made, and Mr. Jewett died November 17, 1903. Plaintiff, his widow, is the beneficiary named in the policy. The defendant in this case reinsured and guaranteed all the policies of the Northwestern Life & Savings Company. The company was duly notified on December 1, 1903, of the death of Mr. Jewett, and was asked for blanks upon which to make proof of death. The company refused to furnish the blanks, and waived proofs of death. The policy of insurance, after the first year's payment, which was paid in advance, required a like amount to be paid each year thereafter in four installments "on or before the first day of August, November, February, and May in every year, until ten full annual premiums have been paid, or until the prior death of the insured." The insurance covered the life of James H. Jewett—

"In the amount of $500, commencing on the first day of August, 1902, at noon, for a period of five years, and in the amount of $1,000, commencing on the first day of August, 1907, at noon, and continuing for a period of five years; and doth hereby promise and agree to pay the amount of said insurance at its office in the City of Des Moines, Iowa, to Mrs. Ina L. Jewett, wife, her executors, heirs, administrators or assigns, upon receipt and approval at said office of proofs, as hereinafter required, of the death of the insured during the continuance of this policy.

"Should this policy be kept in force for the full term of ten years (no death liability having accrued hereunder), then the said company doth promise and agree to pay to

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the legal holder hereof, at its Home Office, the sum of $1,000 and all accumulations in excess of said guarantee which the full amounts to the credit of this policy in the reserve and savings funds may produce.

"This policy is issued subject to the provisions, regulations and agreements stated on the subsequent pages hereof, which are hereby referred to and made a part of this contract."

It further provides:

"The nonpayment of any premium when due shall forfeit all premiums paid on this policy, and terminate the liability of the company thereunder except as hereinafter provided."

There was a clause for the reinstatement of a lapsed policy, which is as follows:

"This policy may be reinstated during the life of the insured at any time within twelve months of date of lapse by the payment of all past due premiums, and a fine of ten per cent. per annum on such overdue premiums."

Under the head of "general regulations" there was a clause which provided:

"Any indebtedness to the Company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or any benefit thereunder."

The above facts were agreed to, so there is no disputed question of fact involved. The court directed a verdict for the defendant, holding that the policy had become forfeited because of the failure to pay the premium due November 1st.

George P. Voorheis and *Fred B. Willard*, for appellant.

Wilkinson, Post & Oxtoby, for appellee.

GRANT, J. (*after stating the facts*). 1. Mr. Jewett was an agent of the insurance company, and familiar with

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the various forms of its policies. He deliberately chose his form of policy, with full knowledge of all its terms and conditions. There is no claim of any unfair conduct on the part of the company. The application and the policy indicate that the policies under this form of insurance were to commence on the first day of some month. Mr. Jewett chose to have his policy dated the 1st of August, rather than the 1st of September following. The terms of the policy are so clear and explicit that "he who runs may read" it and understand it. It provided for the payment of $100 to cover the first annual premiums for one year, running from the 1st day of August to the 1st of August following. It provided that the premiums thereafter should be paid in quarterly installments of $25 each on or before the 1st day of certain months, and that failure to pay as provided should result in the forfeiture of the policy. There is always a time between the application for a policy and its issuance by the company, where it is expressly so provided, that liability does not attach. That fact, however, does not operate to change the times and terms of payment expressly provided in the policy itself. The contention of the learned counsel is that, inasmuch as the policy in question was not in force until the 18th day of August, therefore the payments of the quarterly premiums were postponed 18 days. It would follow also that, had Mr. Jewett lived 10 years, the policy would not have become due until the 18th day of August, 1912, instead of August 1st, as expressly provided in the contract. To so hold would not be the interpretation of ambiguous language, but would result in a court-made contract. *Sydnor* v. *Insurance Co.* (Pa.), 26 Super. Ct. Rep. 521; *Thomas* v. *Insurance Co.*, 142 Cal. 79; *Methvin* v. *Life Ass'n*, 129 Cal. 251; *McConnell* v. *Assurance Society*, 92 Fed. 769; *Bryan* v. *Insurance Ass'n*, 21 R. I. 149.

2. It is urged that the receipt of the premium due August 1st, after another premium was due November 1st, is a waiver of the nonpayment of November 1st. On October 27th, Mr. Jewett wrote for the amount of pre-

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mium then due on his policy, evidently knowing that he was chargeable with interest from the 1st of August should the company see fit to accept the defaulted payment, and thus keep the policy in force. On October 31st the company replied, stating the amount, and on November 4th Mr. Jewett remitted the amount. Mr. Jewett knew that there was another premium which would be due on November 1st. The correspondence had no reference whatever to future premiums. It related solely to a past-due premium, and the only one then due, and the receipt expressly mentioned it as a past-due premium. The company was under no legal obligation to notify Mr. Jewett that another premium would soon be due. He was not prejudiced by the action of the company, and its receipt did not operate as a waiver of the November premium.

The judgment is affirmed.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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BURNHAM *v.* MICHIGAN MUTUAL LIFE-INSURANCE CO.

LIFE INSURANCE—PREMIUMS—NOTE—NONPAYMENT—EFFECT.

An application for a life-insurance policy provided that if a premium be settled by note such note should be regarded only as an extension of time of payment and that the company should not be liable for a loss occurring while such note remained due and unpaid. A premium note, past due and unpaid at the time of assured's death, contained the words, "Send to office for collection," the word "office" being written in the blank, and plaintiff claimed that the note not having been sent to assured's office for collection, the company was in default and the policy in force. *Held*, that if the quoted words could be regarded as a part of the note, rather than as a mere memorandum for the company's benefit, there was nothing to show that the "office" referred to was the office of assured rather than that of the company, and that the company was not liable.

Error to Wayne; Frazer, J. Submitted June 4, 1907. (Docket No. 22.) Decided July 1, 1907.

Assumpsit by Lillian J. Burnham against the Michigan Mutual Life-Insurance Company on a policy of insurance. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Charles Flowers, for appellant.

Wilkinson, Post & Oxtoby, for appellee.

CARPENTER, J. This suit is brought to recover upon a policy issued by defendant insuring the life of plaintiff's husband, George W. Burnham. The policy was dated August 22, 1902. The insured died November 17, 1902. For the premium, which was not paid in cash, the insured gave a note, of which the following is a copy:

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"$74.75. DETROIT, MICH. August 28th, *1902.*

"November 10th, 1902, *I promise to pay to the order of the Michigan Mutual Life Insurance Company,* seventy four and $\frac{75}{100}$ *dollars. Value received.*

"*Due* November 10, 1902.

"*Send to* office *for collection.*

[Signed] "GEO. W. BURNHAM, 1034—14th Ave."

This note was made by filling out a printed blank. The words in italics show what the blank was before it was filled out. The note was past due and unpaid when the insured died. The application contained this clause:

"If the first or any subsequent premium on the policy shall be settled wholly or in part by note or other obligation, * * * such settlement shall not be deemed a payment, but only an extension of time for the payment of such premium, and, if such note or other obligation or any renewal thereof shall not be fully paid when due, then for any loss incurred while such note or obligation remains due or unpaid the company shall not be liable."

The trial court held that under these circumstances there could be no recovery, and directed a verdict in defendant's favor.

Plaintiff's counsel concedes that this ruling would be correct were it not for the writing on said note: "Send to office for collection." He contends that this writing is a part of the note; that it obligated defendant to send the note to the office of the Detroit Journal, where the insured was employed; and that, because this was not done, defendant itself was in default, and therefore plaintiff was entitled to recover. The learned circuit judge decided that the writing under consideration was not a part of the note, but, like the writing just above, "Due November 10th, 1902," was a mere memorandum for the convenience of defendant itself. It is unnecessary to determine the correctness of this conclusion; for, if the memorandum in question is a part of the note, as plaintiff's counsel contends, there is no competent testimony in this case from which the jury could infer that the office referred to was that of the Detroit Journal. On the con-

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trary, the only permissible inference is that it was the office of defendant. The trial court, therefore, properly directed a verdict in defendant's favor.

The judgment is affirmed.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

BREAKEY *v.* WOOLSEY.

1. BOUNDARIES—MONUMENTS—SURVEYS—EFFECT.
   Fences and monuments of long standing, established not long after a survey and plat were made, are better evidence of true boundary lines than surveys made after the original stakes have disappeared.

2. SAME—AGREEMENT—EFFECT.
   An agreement between adjoining landowners establishing a boundary line, acquiesced in by the parties, is binding, although the line established is not the original one.

Appeal from Calhoun; North, J. Submitted June 5, 1907. (Docket No. 27.) Decided July 1, 1907.

Bill by Julia E. Breakey against George S. Woolsey and Phoebe J. Woolsey to determine the boundary line of certain real estate. From a decree for defendants, complainant appeals. Affirmed.

Laura A. Lynn in 1901 was the owner of the west half of lots Nos. 2 and 3, of block No. 44, in Hurd's addition to the city of Marshall. She purchased them in 1888. There were at that time well defined fences along the westerly and northerly sides of said property, portions of

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which were in existence when this suit was launched December 21, 1905. In 1901 Mrs. Lynn sold to the defendant George S. Woolsey the west half of lot No. 2, and the east fourth of lot No. 3,—

"Reserving the right to use the driveway along the west line of said lot, it being understood that each party shall have the right to use said driveway and that each party shall maintain and keep in repair one-half of said driveway, provided that the west line of said driveway shall be at least six feet and two inches from the house now located on the lot west of the above described premises."

Mrs. Lynn had built a house on the westerly part of this land, and a house and barn on the easterly portion, the part conveyed to Mr. Woolsey. The grantor also reserved the barn situated on the land conveyed to Woolsey. About midway between these two houses there existed, and had for a long time, a driveway. Shortly after the deed to Woolsey he and Mrs. Lynn measured from the westerly boundary line of lot 3 in order to determine the line between the westerly three-fourths of lot 3 and the easterly fourth, which was to be the boundary line between the two parcels of property. An iron stake was driven into the ground at the north boundary line. Mrs. Lynn moved her barn, and located it about one foot west of this stake, and Mr. Woolsey built a barn 14 inches east of the same. Subsequently Mr. Woolsey and Mrs. Lynn improved the driveway, straightening the edges and locating the western wheeltrack 6 feet 2 inches from the Lynn house, and placing cinders upon it. A woodshed had also been constructed on the westerly part of lot 3 with the eaves at the westerly line as indicated by the fence. In this condition in September, 1904, Mrs. Lynn and her husband, who had meanwhile become tenants by the entirety, sold and conveyed the west three-fourths of lot 3 to the complainant. The deed contained the following clause:

"Also including the right to use the driveway along

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the west line of the east ½ of said lot No. 3, according to the terms of a deed given by Laura A. Lynn to George S. Woolsey, on the tenth day of July, A. D. 1901."

A dispute subsequently arose between the parties to this suit in regard to this driveway, and the complainant, claiming that the land between the two lots was not located in accordance with the original plat, filed the bill in this case, asking the court to determine the boundary line between the parties, to locate a driveway and determine its width, and to restrain encroachments upon complainant's land. Answer and replication were duly filed, proofs taken in open court, and decree entered for the defendants. In addition to the above facts, the learned circuit judge also found that there was considerable inaccuracy in the plat of Hurd's addition, which was recorded over 50 years ago, and that, as to the property in this case, there was great uncertainty. Block No. 44 is cut up into a dozen or more city lots, varying in size, owned by different parties, and occupied by them and their grantors for half a century. On the block are numerous fences of long standing, and well defined. In one instance a monumental tree was placed at the intersection of the lines of four of these lots, and is still standing, and these various lots have for years been maintained relative to these old boundary lines, some of which have been known to exist for upwards of 50 years. Upon checking up these boundary lines from surveyors' monuments, found in a westerly direction, they are found to be accurate; but, on measuring the distance across block No. 44, it was discovered that there is a surplusage of about 1 inch to the rod, 31 inches in all, and, if the surveyors' monuments found in the easterly direction should be followed, the various property lines would be shifted from a few inches to upwards of a foot, and would unsettle practically all the north and south boundary lines of the whole block. It would necessitate moving the defendants' barn and the complainant's woodshed. A decree is entered establishing the line according to the measurements made by Mr. Lynn and Mr.

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Woolsey at the time of the transfer of the land to Woolsey. In other words, he located it three rods east of the fence marking the west boundary line of lot 3.

John C. Patterson, for complainant.

Miller & Miller, for defendants.

GRANT, J. (*after stating the facts*). It is the contention of the learned counsel for the complainant that the deeds were made with reference to the original plat and monuments, and they must control. If the location of the original monuments and stakes was conclusively established, there would be some force in this contention. But the judge expressly finds that it was not, and that, in the absence of such location, the fences and other monuments, erected and established about that time, and ever since recognized, are better evidence of the actual location of the lot lines than are surveys based upon uncertain monuments. The evidence fully sustains his finding. The distance between the foundation walls of the two houses is 19 feet. The present driveway as it has always existed, and, as apparently agreed to by the Lynns and Mr. Woolsey, is 6 feet 10 inches wide, 6 feet 2 inches from the Breakey house, and 6 feet from the Woolsey house. The location of the driveway, as contended by the complainant, if of sufficient width for the passage of loads of hay (and it is conceded that such was the intention), would, as found by the circuit judge, necessitate the moving of the defendant's residence. No stakes of the original survey were found. The westerly fences of complainant's lot and other fences and monuments were established not long after the survey and plat were made. It was said in *Carpenter* v. *Monks*, 81 Mich. 103:

"Fences of long standing, erected upon what parties have called the true line, and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared."

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This feature of the case is ruled by that case, and also by *Flynn* v. *Glenny*, 51 Mich. 580, and other cases therein cited.

We are also of the opinion that the Lynns and Mr. Woolsey established a boundary line by agreement, and thereafter acquiesced in it, and so did the parties to this litigation, until the complainant believed that the original survey and plat would give her more land. Such an agreement is binding, although the line established is not the original one. *Brown* v. *Bowerman*, 134 Mich. 695; *Manistee Manfg. Co.* v. *Cogswell*, 103 Mich. 602; *F. H. Wolf Brick Co.* v. *Lonyo*, 132 Mich. 162.

The decree is affirmed, with costs.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN OF THE STATE OF MICHIGAN *v.* McKAY.

LIFE INSURANCE—MUTUAL BENEFIT INSURANCE — DESIGNATION OF BENEFICIARY—MEMBER OF FAMILY—EVIDENCE.

On a bill by a fraternal beneficial association to interplead the claimants of the proceeds of a certificate, evidence examined, and *held*, that a foster son of deceased, never legally adopted, who had his own home, separate from that of deceased, was not a member of the family of deceased, and that the designation of him as beneficiary in the certificate was invalid under the rules of the order.[1]

[1] As to who is a member of the "family" within contract of benefit society, see note to *Supreme Lodge, Order of Mutual Protection* v. *Nevins* (Mich.), 8 L. R. A. (N. S.) 334.

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Cross-appeals from Wayne; Rohnert, J. Submitted June 5, 1907. (Docket No. 30.) Decided July 1, 1907.

Bill of interpleader by the Grand Lodge of the Ancient Order of United Workmen of the State of Michigan against Mary J. McKay, William D. McKay, Lillie Bain, Annie McKay, and Margaret McDonald to determine title to the proceeds of a benefit certificate. From a decree awarding a part of the fund to defendant Mary J. McKay, defendant William D. McKay appeals; and from a decree awarding the balance of the fund to defendant William D. McKay, defendants Bain, Annie McKay, and McDonald appeal. Modified and affirmed.

John E. Ryan (*Van Zile & Brownson*, of counsel), for appellant William D. McKay.

Corliss, Leete & Joslyn, for appellants Bain, Annie McKay, and McDonald.

Wardall & Wardall, for appellee.

BLAIR, J. Complainant is a fraternal, beneficiary association, organized under Act No. 130, Pub. Acts 1899 (2 Comp. Laws, § 8047). Robert G. McKay became a member February 28, 1878, at Detroit, and remained a member until his death, September 30, 1904, in Seattle, Wash. Complainant filed its bill of interpleader and deposited the beneficiary fund of $2,000 in court for distribution to such claimants as should be determined to be entitled thereto. Decree of interpleader was entered, and complainant was paid its costs of $50 out of the fund, so that it is no longer interested in the case.

Defendant Mary J. McKay was the divorced wife of the deceased, Robert G. McKay, and claims the fund by reason of the alleged payment by her of certain assessments during the life of deceased. She was awarded $500 by the decree of the lower court. Defendant William D. McKay claims the entire fund as holder of the

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last beneficiary certificate, and under the will of the deceased. He was not the son of the deceased, was not related to him in any way by blood, was never legally adopted, but claims to have been "a member of the family of deceased." He filed a cross-appeal from the decision of the lower court, claiming the entire fund, instead of the $1,450 awarded him by the decree of the trial court. The remaining claimants, Lillie Bain, Annie McKay, and Margaret McDonald, who also appeal, are the three sisters of the deceased. They are his sole legal heirs, and were the holders of a prior certificate. They claim the fund as his legal heirs (being the only blood relatives of the deceased) and as holders of the prior certificate. They have consented in their answer and cross-bill that the widow of the deceased shall receive from the fund the repayment to her of moneys paid by her as assessments, and are satisfied with the allowance of $500 made to her by the court below, but they claim that the remainder of the fund belongs to them under the rules and regulations of the Ancient Order of United Workmen and by law as the legal heirs of deceased. The by-laws of the complainant provide:

"SEC. 15. Each and every member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more members of the family of the member or some person or persons related to him by blood, or who shall be dependent upon him."

William D. McKay was neither a relative by blood nor dependent upon Robert G. McKay. The ground of eligibility to the beneficiary fund, upon which, if any, he is entitled to it, is that he was a member of the family of the deceased. The certificate designating William D. McKay as beneficiary was executed April 27, 1904. Robert G. McKay and Mary J. McKay were married in 1867. In 1879 Mrs. McKay took William D. McKay from a foundling hospital, and brought him up, but he was never legally adopted. From 1879 to 1886 Robert and Mary McKay

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resided at Detroit, he a member of the police force, she keeping a small millinery store. In 1887 they moved to Jamestown, N. D. Here a separation occurred, Mrs. McKay returning to Benton Harbor, Mich., where she lived from 1887 to 1890 with the boy, William McKay. Robert McKay went west to Ellensburg, Wash. From 1890 to 1892 they lived together after a reconciliation at Ellensburg, Wash. From 1892 to 1896 they lived at Kirkland, across Lake Washington, near Seattle, where the boy attended school. From 1896 to 1900 Mary J. McKay and the boy William lived in Seattle; she doing dressmaking, he working as a stenographer, they going back to Kirkland frequently on Saturday nights, and staying until Monday morning. In 1901 both Robert G. and Mary J. McKay lived in a new house built by them at Kirkland. William was working in Seattle and living there, going now and then to Kirkland from Saturday night until Monday. In 1902 Robert G. and Mary J. McKay were divorced and separated, Robert going to a small place across the lake. William was married during this year, and for three months he and his wife boarded with Mary J. McKay. In November, 1903, William D. McKay moved with his wife into a house on Queen Ann Hill, Seattle. He testifies:

"*Q.* Did your father or mother visit you there?

"*A.* Mother did for a short time after we moved there, and then she quit coming, and during all the time father came out. He made his home right with us.

"*Q.* Would he be constantly with you there on Queen Ann Hill?

"*A.* Nearly so, Mr. Ryan. He had a room across the lake in a tumbledown brick building which he took after the divorce, merely stayed there to protect himself for voting, so that he would be entitled to vote across the lake, but his home was practically with us. Always every Sunday he would come over for the first thing Sunday morning, go to church twice a day, stay over Sunday night, and quite frequently would not go back until Monday night or Tuesday morning. * * *

"*Q.* Up to the time you became self-supporting, Mc-

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Kay, Mrs. Mary McKay supported you, bought your clothes, sent you to school and educated you?

"*A.* Yes, sir; up to the time I started to support myself. * * *

"*Q.* You testified that after your marriage you lived for some time with Mrs. McKay?

"*A.* Yes.

"*Q.* Did you pay your board?

"*A.* Yes, In fact, I more than paid it. At the time I left there was a grocery bill of about $19 that had come while I was there. I went up to Mr. Brooks, the storekeeper, and paid all of that before I left—every cent of it. * * *

"*Q.* Who owns the home where you live?

"*Mr. Douglas:* Objected to as incompetent, irrelevant and immaterial.

"*A.* We own it. It was given to us by my wife's mother.

"*Q.* It was mortgaged for $1,700, was it not?

"*A.* That was merely a blind mortgage to protect the money that she had put into it. She wanted us to have it for a home, and there was some dispute about it among the other children, so she closed the deal in that manner."

Ellen A. McKay, wife of William D. McKay, testified:

"After we were married we lived with mother for some time, I mean Mr. McKay's mother; that was for two or three months. Afterwards we went to housekeeping in September. Mr. Robert G. McKay lived with us then some little time, nine or ten months.

"*Q.* After you left Kirkland, where did you move to?

"*A.* To Anacortes. We lived there two or three months, and then went to live at Queen Ann Hill, Seattle, in our own home. We have lived there for two years. I recall when Robert G. McKay died. It was September 30, 1904.

"*Q.* Prior to his death and after you returned to Seattle and moved on Queen Ann Hill, did he make his home with you?

"*A.* He spent his Sundays with us, and also two or three days during the week.

"*Q.* He still kept his home across the lake, did he?

"*A.* Yes, sir. He was always welcome at our house. * * * When he would go back across the lake to his room across the lake, to his room after leaving our home, he

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usually took with him bread, cake, and pie that I made for him, that I baked myself. We attended church together, and went out in company with his mother and father. I looked after the care of his clothes. When he lived with us, I did his washing and mending, and after we moved here I always did his mendings. * * * For two or three months after our marriage we lived with Mr. and Mrs. McKay at Kirkland. Afterwards we kept house at Kirkland for nine or ten months. Then we lived at Anacortes two or three months, and then during the year 1903 or 1904 occupied our own home on Queen Ann Hill, Seattle, commencing about the first of November, 1903.

"*Q.* Well, from December 1, 1903, until the present time, you and your husband have occupied your own home on Queen Ann Hill?

"*A.* Yes, sir.

"*Q.* During all this time Mr. Robert G. McKay occupied his own home across the lake?

"*A.* Yes, sir; since we have been in Seattle.

"*Q.* He always called that his home, and he voted there?

"*A.* Yes, sir.

"*Q.* He voted there?

"*A.* I don't know where he voted.

"*Q.* Since the time you went to Anacortes, neither you nor your husband have lived with Mr. Robert G. McKay in his home, have you?

"*A.* No, sir.

"*Q.* Since you have been married, has your husband earned his own living?

"*A.* Yes, sir.

"*Q.* He has not been supported by R. G. McKay at any time?

"*A.* No, sir. * * * We were married in April, 1902, and lived directly after that with Mrs. McKay for two or three months. We paid half the expenses, and she paid the other half. Then we went to live in Kirkland and went to housekeeping, and Mr. McKay lived with us there and paid half the expenses. Then we went to Anacortes, and from there to Queen Ann Hill. Mr. McKay still lived at Kirkland.

"*Q.* He always lived there, did he?

"*A.* Yes. He came to visit us occasionally on Queen Ann Hill two or three days a week."

Under the facts disclosed by this record, the defendant

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William D. McKay was not a member of the decedent's family. The case is ruled by *Supreme Lodge Order of Mutual Protection* v. *Dewey*, 142 Mich. 666 (3 L. R. A. [N. S.] 334.)

As defendants Lillie Bain, Annie McKay, and Margaret McDonald, who are entitled to the fund, consent that the decree, so far as in favor of Mary J. McKay, may stand, the decree will be modified to provide that the balance of $1,450 shall be paid to said defendants Lillie, Annie, and Margaret, or their solicitors, and, as so modified, the decree is affirmed, with costs of both courts to said defendants against the defendant William D. McKay.

CARPENTER, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

DECKER *v.* KLINGMAN.

1. BROKERS — REAL ESTATE — CONTRACT TO SELL — MERGER IN WRITING.

   In an action by a real estate broker to recover commissions on the sale of land, evidence examined, and *held*, that all prior negotiations regarding the contract of employment were merged in the written agreement between the parties containing an option.

2. SAME—COMMISSIONS—WHEN ENTITLED.

   Where a real estate broker is employed to sell real estate within a certain time, and the time expires without his having made the sale, he is not entitled to his commission, though the sale is ultimately made by the landowner to a person introduced by the broker, there being no fraud or bad faith on the landowner's part to prevent performance on the part of the broker.[1]

[1] As to performance by a real estate broker of his contract to find a purchaser, see note to *Lunney* v. *Healey* (Neb.), 44 L. R. A. 598.

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Error to Kent; Wolcott, J. Submitted June 6, 1907. (Docket No. 44.) Decided July 1, 1907.

Assumpsit by Peter W. Decker and Fred R. Jean, copartners as Decker & Jean, against Philip J. Klingman for commissions on the sale of real estate. There was judgment for defendant on a verdict directed by the court, and plaintiffs bring error. Affirmed.

Smedley & Corwin, for appellants.

Taggart, Denison & Wilson, for appellee.

BLAIR, J. Plaintiffs brought suit to recover commissions alleged to be due them for services as brokers in procuring a purchaser for certain real estate of defendant. Negotiations began in the spring of 1905.

"This Klingman property was not listed under contract. We had a description of the property, knew it was for sale, and had instructions from Klingman to sell it before the written option was taken."

February 26, 1906, plaintiffs received a letter from defendant, in part, as follows:

"Mrs. Klingman advised me yesterday that you had called at the house Saturday in regard to possibility of our disposing of our house, and, while I am very reluctant to bring this subject up with her, because it seems to be an unpleasant one, she gave it more consideration this time than at any time in the past. Now, if you are talking business, or can talk business, why, I think we could be willing to listen; but there is no use of talking about exchange of property or anything of that kind, and if your party are thinking seriously of purchasing that property, why, let them make an offer. During our various talks you know what figure I would expect for the place.

"Our position is this: Mrs. Klingman doesn't want to sell, and I do. At the same time, I have very little to say in this matter. However, we intend doing one of two things, namely, if I don't sell, in all probability I shall build a double house on the lot adjoining my present resi-

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dence, as I have 120 feet of ground, and it is more than I want.

"If anything is to come of this, better get down to business at once because if you don't do business now that will end it."

Plaintiff Jean testified:

"I went to Mrs. Klingman before that option was signed, and went to Mr. Klingman, but he told me that Mrs. Klingman didn't want to sell, and there was no use talking unless I could get her to agree to sell. I had an oral agreement with Mr. Klingman then, March 5th. He told me that any time I could get Mrs. Klingman's consent I could show the property and sell it. A week or so before that agreement was signed, I went to see Mrs. Klingman myself at Mr. Klingman's suggestion, and followed it up by getting this signed on March 5th. Until that time I didn't have any definite thing to go upon, because Mrs. Klingman had never consented. I couldn't make that sale without her consent."

On March 5th, the parties entered into the following contract:

"GRAND RAPIDS, MICH., March 5, 1906.

"In consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, and to be considered as part of the purchase money, I hereby agree to sell the property located at 152 South College avenue, lot 120x132 ft. in the city of Grand Rapids, county of Kent and State of Michigan, to Decker & Jean or their assigns for the sum of sixteen thousand dollars. The terms of sale to be as follows: $16,000.00 on delivery of warranty deed, and we are to have possession of said house until October 1, 1906, and we are to pay Decker & Jean 2½ per cent. when sale is completed.

"Sale to be closed on or before April 1, 1906.

"I to furnish an abstract of the property, written up to date; also abstract of taxes, and to give a clear title.

[Signed] "Mrs. JOSEPHINE KLINGMAN.
"P. KLINGMAN.

"I hereby agree to purchase the above described property from ———, at the price and on the terms above mentioned, on or before ———, 190—, or forfeit the above payment of $———.

"[Signed] ———."

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On the back of said paper is the following:

"I, P. Klingman, have signed the option with the understanding that, if Mrs. P. J. Klingman will not sign, that signature is null and void.

"P. J. KLINGMAN.

"DECKER & JEAN, per Jean."

Plaintiffs were endeavoring to sell the property to Mr. Tuthill, whose partner in business, Mr. Baldwin, the owner of the adjoining property, was very anxious that he should purchase, and, to that end, was willing and desired to purchase a portion of the land adjacent to his premises. Plaintiffs were notified prior to the 1st of April that they must make the sale on or before April 1st, as provided in the written agreement. After the making of the written agreement, defendant agreed orally to accept $14,000 net for the property. On March 27th, plaintiffs received the following letter from defendant:

"Beg to acknowledge receipt of your favor of the 27th. As regards making sale of property, would state, I would be greatly pleased if you make the sale exactly on lines your option calls for and within the space of time called for in option, and, to use your own words, I hereby notify you that if you don't sell the property before the expiration of the option that we will consider the option as null and void, in accordance with date on same, and if I then desire to sell the property, shall either make a new deal with you or dispose of it myself. As for paying you any commission after date of option expires, would state that might be a question of law, which you might have to go through to collect anything I might think isn't due you. I believe that after April 1st you aren't entitled to anything, no matter who I sell the property to, and I will state very clearly the following facts, namely, that we shall not sell the property to your customer. I did think that I might concede something to you, whether we sold your customer or not, but if you take such a decided stand as you have in your letter, I question whether you are entitled to anything, as you apparently may go on the 'whole hog or none' plan.

"I would suggest that you advise me of any develop-

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ments as regards progress Mr. Decker is making, as you have but a few days left to exercise your option.

"Yours truly,

"P. J. KLINGMAN."

Plaintiff Jean testified:

"After I got this letter of the 27th, I approached both Baldwin and Tuthill again in regard to buying the property and got the same response, except that Mr. Tuthill said that the deal was all off; he wouldn't have anything to do with it; and so did Mr. Baldwin, except that he wanted me to see Mr. Klingman and see if he could buy 25 feet or more off from the lot, and let Klingman keep the balance, to see if Klingman would make him a price on that 25 or 50 or 60 feet. He didn't care how much. I saw Mr. Klingman in regard to it. He said he wouldn't sell Mr. Baldwin any of it. If he didn't sell it all, he wouldn't sell any of it."

Plaintiffs were unable to sell the property for $14,000 net during the period prescribed, and defendant, a few days after the expiration thereof, sold the property to Mr. Baldwin for $15,500. Prior to the purchase by Mr. Baldwin, it was agreed between him and Mr. Tuthill that Mr. Tuthill should take the house and 99½ feet of land, pay $8,500, and assume a mortgage of $4,500, and Mr. Baldwin should take the remaining 20 feet of land and pay $2,500. Mr. Tuthill, who was called as a witness by plaintiffs, testified:

"When I talked with Mr. Jean shortly before the 1st of April, he said that Mr. Klingman wouldn't sell for $14,000, and I told him I wouldn't pay any more. I then definitely and finally abandoned all negotiations for that property. After that I looked through several houses and had practically decided to buy the Welch property. We had agreed on all the terms incident to the deal, and I should have undoubtedly closed it up if the matter had not finally come up in another form through Mr. Baldwin. Mr. Baldwin went with me to look through the Welch house, and I think on the same day after going through that house we went through the Klingman house. * * * I am not able to give you the date when I went to Klingman's house with Mr. Baldwin. I should

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imagine it was after the 1st of April, somewhere about the 3d or 4th, I couldn't state positively. I made no memorandum of the date at all."

At the close of plaintiffs' testimony, the court, on motion of defendant's counsel, directed a verdict for defendant. To review the judgment entered upon the verdict, plaintiffs prosecute this writ of error.

We think that the court correctly held that all prior negotiations were merged in the written agreement; that the rights of the parties must be determined thereby, except, perhaps, as to the modification of the price to be paid for the property; that plaintiffs failed to perform the contract; that the evidence negatived any inference of fraud or bad faith on the part of defendant to prevent performance by plaintiffs; and that after April 1, 1906, defendant was at liberty to sell the property to whomsoever he chose, without liability to plaintiffs.

The judgment is affirmed.

CARPENTER, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

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LEHIGH *v.* STANDARD TIE CO.

1. SALES — ACTION FOR PRICE — INSPECTION — EVIDENCE — SUFFICIENCY.

   In an action for the price of railroad ties sold and delivered, evidence examined, and *held*, sufficient to go to the jury on the issue whether a claimed inspection was such as the contract of sale provided.

2. EVIDENCE — EXPERTS — COMPETENCY.

   A witness who states he has shipped railroad ties to a certain market and seen the reports of the inspection sent back from there may state what an inspection according to the rules of that market would show with regard to a certain lot of ties with which he is familiar.

3. SAME — SALES — ACTION FOR PRICE — QUANTUM MERUIT — EVIDENCE — SUFFICIENCY.

   In an action for the price of goods sold and delivered, the contract price is some evidence of their value, and is sufficient on that point to support a recovery on the quantum meruit.

Error to Mackinac; Shepherd, J. Submitted June 7, 1907. (Docket No. 51.) Decided July 1, 1907.

Assumpsit by Mark Lehigh and James G. McClintock, copartners as Lehigh & McClintock, against the Standard Tie Company for goods sold and delivered. There was judgment for plaintiffs, and defendant brings error. Affirmed.

Henry Hoffman, for appellant.

James McNamara & Son, for appellees.

MONTGOMERY, J. Plaintiffs contracted with defendant to furnish 8,000 to 10,000 cedar ties and 12,000 to 15,000 cedar posts, to be delivered on rail of vessel at St. Martin's Bay, Mackinac county, on or before June 1, 1905. The contract also provided that for ties made from green

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timber plaintiffs should receive 32 cents, and for standard ties made from dry timber 30 cents. It also provided that 10 per cent. of the ties might be No. 2's at 12 cents each on the rail of the vessel. The declaration was special on the contract, averring performance, and also on the common counts. It was shown and averred in the declaration that, after the making of this contract, it was agreed between the parties that in place of an inspection to take place at St. Martin's Bay as the ties were loaded, which was at first contemplated, plaintiffs should accept Chicago inspection. The language in which this agreement was made is as follows:

"We will accept Chicago inspection on our ties instead of having Mr. St. James inspect them here."

The ties were shipped to Chicago. No inspector was agreed upon between the parties; but the defendant, in making a sale of the ties to the Chicago & Northwestern Railroad Company, agreed to accept inspection of the company's inspector, Mr. Clair. His inspection of the ties showed a total of 5,906 No. 1 ties and 6,522 rejects. The plaintiffs offered testimony tending to show that the ties which were loaded and shipped to the defendant would run 22 to 23 per cent. No. 2's, and the balance, with the exception of possibly 2 per cent. rejects, would be No. 1's. The circuit judge charged the jury that the plaintiffs had the burden of proof, and that the parties had agreed to abide by an inspection, and any mistake in judgment which the inspector made they must abide by, and that, if the inspector used his judgment fairly or if he used his judgment without any intention to favor one side or the other, his inspection must govern; and, if the jury should find that the inspector did not use his best judgment, then they should arrive at the fair value the best way they could.

It is the contention of the defendant that there was no evidence tending to impeach the inspection, and that the verdict should have been directed for the defendant. We

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think the charge of the court sufficiently favorable to the defendant. This is not a case in which a particular inspector has been agreed upon by the parties. Plaintiffs were given no choice in this respect. The sole effect of the modification of the original contract was to provide that Chicago inspection should govern the parties. That we take to mean that the rule which controlled the Chicago inspection as to what ties should be considered No. 2's and what No. 1's would control; and this implied that an honest inspection of the ties should be made by such rules, and that such inspection should be made with reference to the contract between these parties. If there were no fact or circumstance to cast doubt upon the testimony of the inspector, or to raise a fair question as to whether the inspection represents accurately the quality of these ties according to the rules of the Chicago inspection, there would be no question for the jury. But we think there was enough to raise a fair question for the jury. It is a significant fact that although the parties contracted with reference to No. 2 ties and recognized such a grade, and although the testimony of the plaintiffs tend to show that there were at least 22 to 23 per cent. of No. 2 ties in these shipments, the inspection made at Chicago shows a total inspection of over 13,000 ties and not one No. 2 tie found. It also appears that in the inspection of the two cargoes of the Hurd a distinction was made between culls and rejected ties. The first cargo is shown by the inspection to have had 13,110 No. 1 cedar ties, 1,115 culls, and 830 rejected. The second cargo had 8,101 cedar ties, 2,823 culls, and 3,410 rejected. It would seem that everything below No. 1 was treated either as cull or rejected, and in the inspection of the ties shipped by the steamer Pine Lake no distinction was noted between cull and rejected. In the inspection of the Hurd there was a distinction noted, but just what was meant by the distinction is not clear. In neither inspection were there any No. 2's accounted for. We think this circumstance, in connection with the testimony of

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the plaintiffs' witnesses, was sufficient to raise a fair question for the jury as to whether the inspection had been made in accordance with the contract.

Objection was made to certain questions put to the witnesses as to what these ties would show according to the Chicago inspection. These questions were put to the plaintiff Lehigh. The questions and answers were as follows:

"*Q.* Now, what would you say as to the inspection of this cedar that you had there, that you tallied on the vessel, that was gotten out by you and McClintock?

"*Mr. Hoffman:* I object to the question as incompetent in the way the question is put. (Objection overruled, and an exception duly taken.)

"*A.* The way I have always seen cedar inspected, etc., it would run about 22 or 23 per cent. to seconds.

"*Q.* Now would that be Chicago inspection at an honest count—an honest inspection in Chicago?

"*Mr. Hoffman:* I object to that as incompetent, for the reason that it is asking this witness for a count in Chicago that he has not testified he knows anything about that at all. (Objection overruled and an exception duly taken to such ruling.)

"*A.* Why, yes, those would be of good merchantable ties.

"*Q.* As I understand your testimony that you gave yesterday, is that you have had experience in Chicago inspections?

"*A.* Not directly, in Chicago. I have sent ties to Chicago market, and seen the report after it came back, and I know how them ties went.

"*Q.* As I understand you, you say that you would consider the inspection that you proposed for these ties would be the same in Chicago?

"*Mr. Hoffman:* That is objected to. It is not what he proposes."

We think this testimony was sufficient to show some knowledge on the part of this witness of the Chicago inspection. The precise objection that the witness had not shown himself competent to testify as to the Chicago inspection was not in fact made in counsel's objection. The point appears to have been that, as the witness was

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not present when the count was made in Chicago, he could not impeach that count by showing that it omitted the large number of No. 2's wholly from the inspection.

It was also complained that the circuit judge in his charge left the jury to find the value of the ties under the quantum meruit, and it is said there is no evidence of value. The price fixed by the contract was some evidence of value.

We think no prejudicial error was committed, and the judgment will be affirmed.

GRANT, BLAIR, OSTRANDER, and HOOKER, JJ., concurred.

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153 386
153 390
153 391

VAN CLEVE *v.* RADFORD.

1. FRAUD—MISREPRESENTATIONS—RECOVERY.
   A buyer of corporate stock cannot recover of the seller the money paid therefor on the ground of misrepresentations as to the earnings of the corporation where he knew precisely what the representation meant, how the conclusion therein stated was arrived at, and it did not mean, and was not, as to him, a representation that the earnings of the corporation were what he alleges was stated to him.

2. SAVING QUESTIONS FOR REVIEW—VARIANCE.
   An objection on the ground of variance between the declaration and proof must be made in the trial court.

3. APPEAL AND ERROR—REVERSAL—HARMLESS ERROR.
   A judgment will not be reversed, whatever the assignments of error, if a correct result has been reached upon undisputed facts and the applicable law.

4. SAME—VARIANCE—AMENDMENT—LIMITATIONS.
   Where a verdict should have been directed for defendant as

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requested on the ground of variance, and the declaration could not have been amended so as to set up the cause of action proved, because of the statute of limitations, a judgment for defendant will not be reversed.

Error to Wayne; Rohnert, J. Submitted April 10, 1907. (Docket No. 49.) Decided July 1, 1907.

Case by John W. Van Cleve against George W. Radford, James W. Fales, Alexander McVittie, Frank N. Clark, and Anson Waring for false representations on the sale of corporate stock. There was judgment for defendants, and plaintiff brings error. Affirmed.

Fred A. Baker (*Albert B. Hall*, of counsel), for appellant.

S. P. Bradley, for appellee Radford.

Maybury, Lucking, Emmons & Helfman, for appellees McVittie and Fales.

OSTRANDER, J. Upon the second count of the declaration, which is framed upon the theory of affirmance by plaintiff of whatever contract he made (the first count was abandoned at the trial), there was a verdict and judgment for defendants. The averments are, in substance: That on May 15, 1892, defendants sold plaintiff 600 shares of the capital stock of a corporation known as the "Keeley Institute," and received from him as purchase price $15,000, being the par value of the stock; that certificates for said shares of stock were afterwards issued and delivered to plaintiff. The representations averred to have been made and relied upon are: That the capital stock of said corporation was $250,000, all paid in, the holders thereof subject to no further assessments or calls thereon; that defendants were owners and holders of the stock, their title thereto good, and they lawfully entitled to sell and transfer the same; and that the earnings of

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said corporation had been and were so great that there was a net profit annually of 12 per cent. on the $250,000 of capital stock. The falsity of each of these representations is averred as follows:

"Whereas, in truth and in fact the authorized capital stock of said corporation was only $50,000, and of which only $30,000 had been paid in, and of which authorized and partly paid up capital stock the said 600 shares were not a part, and each and every share of said 600 shares of alleged stock was wholly unpaid, and they, the said defendants, were not the owners and holders of said 600 shares of stock, and they had no title to the same, * * * and the earnings of said corporation had been and were so small that they were no more than sufficient to pay the expenses of said corporation, leaving no net profits whatever."

It is averred that, if the representations made had been true, the stock would have been worth $15,000; that by reason of the falsity of said representations it was wholly worthless. The facts are that defendants had organized a corporation with a capital stock of $50,000. Articles of association were executed December 2, 1891, and filed with the clerk of Wayne county December 9, 1891. The purposes of the corporation, stated in the articles, were to establish a health institution in the State of Michigan for the treatment of patients suffering from opium, liquor, and tobacco habits or neurasthenia, according to the methods and treatment given to such patients by the "Leslie E. Keeley Company," and Dr. Leslie E. Keeley, of Dwight, Ill., by the administration and use of said Dr. Leslie E. Keeley's so-called chloride of gold remedies, and also for the sale of said remedies. For the right to use these remedies in Michigan, defendants, or some of them, had paid the institution at Dwight $30,000. Opening in December, 1891, at Northville, Mich., the institute had so succeeded that, with four patients in December, 1891, in March, 1892, it had 38 patients. Real estate had been bought which cost $2,500, and furniture had been added. Five thousand dollars had been borrowed of a

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Detroit bank. The average duration of treatment for a patient was four weeks, the cost of remedies administered about $15, the charge for treatment $25 a week. Plaintiff was born in Ypsilanti, living there until he was 15 years of age. His business experience had been varied and extensive. He went to Dwight, Ill., in November, 1891, leaving there December 5, 1891, after taking the treatment. He saw the large number of patients there, and heard there were 600 of them in line. He afterwards corresponded with the Dwight institution about securing the right to use the remedies in the State of Delaware. From Dwight, he went to Ypsilanti. He attended the lecture of Dr. Keeley at the Y. M. C. A. in Detroit, December 26th or 27th, and attended the formal opening of the Northville Institute, Dr. Keeley being present, the next day. He returned to New York early in 1892, came back in March, and introduced a friend to the Northville institution for treatment in April. April 13th or 14th, he and defendant Radford had some talk about engaging in the business in Canada. About April 21st, plaintiff came to Detroit, saw Radford, and was told by him that it was proposed to start other institutes in Michigan, and that, if plaintiff would raise $50,000 in stock in Ypsilanti, they would move the institute to Ypsilanti. On April 25th, Radford wrote and signed and gave to plaintiff, at his request, a note addressed to plaintiff, reading:

"In answer to your inquiry, will say that the Keeley Institute at Northville is now paying 12 per cent. on $250,000."

Plaintiff wanted this statement to show to friends in Ypsilanti, to which place he was himself urging that the institution be removed. Before arriving at the conclusion stated in this writing, plaintiff and Radford figured over the profits of the institution on the basis of 38 patients, reaching the result of an income of $3,800 a month, expenses $1,300 a month, profit $2,500 a month, or $30,000 a year. The arrangement between plaintiff and defend-

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ants was, in substance, incorporated in a written memorandum, reading:

"Mrs. Swift (whose property in Ypsilanti was purchased for the institution) sells her place to Co. on contract—$25,000 down, bal. $15,000 on or before one and two years, 6 per cent. (to be paid from first receipts of this institute). The present stockholders sell to your syndicate one-fifth interest in the Keeley Institute (to be removed to Ypsilanti) for $50,000 cash. Your syndicate loans to Co. $12,500 (one-half of down payment to Mrs. Swift) and takes the Co.'s note at 6 per cent. The present stockholders loan the same amount to Co. on same terms, for same purpose. These notes to be payable pro rata out of first earnings of this Institute. Your syndicate and present stockholders to loan in equal portions sufficient to put Swift property in shape for business, the amount for that purpose being estimated not to exceed $5,000. The capital of the Co. to be increased to $250,000, or $500,000, as your syndicate may desire."

This arrangement was not in all respects performed, but pursuant thereto plaintiff secured subscriptions, including his own, to stock, and the institute was removed to Ypsilanti. The money proposed to be raised by plaintiff by sales of stock was to be paid to defendants, and not to the company. Plaintiff was to become manager of the company. He did become manager. On May 14, 1892, amended articles of association were executed, by the terms of which the capital stock was increased to 10,000 shares, or $250,000, held, as therein stated, by the defendants, and the place of business was changed to Ypsilanti. Whatever stock in the institution came to plaintiff or was issued in his name was dated June 15, 1892, and purported to be issued by a company having a capital stock of $250,000. The facts stated were all of them known to plaintiff when he subscribed for his stock and when he paid whatever sum he did pay as purchase money. Plaintiff not only failed to prove, but he disproved, the contract, and each of the representations, set out in the declaration. He was forced to, and does, rely upon the representation, not alleged, of the earnings of the institution at

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Northville, which representation his testimony, he claims, tends to prove was false. This upon the theory that some of the expenses of the institution were fraudulently concealed. Whatever the writing and the statement contained therein may have meant to those to whom plaintiff exhibited it and whom he induced to engage in the enterprise (*Coombs* v. *Radford*, 110 Mich. 192; *Glover* v. *Radford*, 120 Mich. 542), and whether it was a true or a false statement of fact, it is made entirely clear that he knew precisely what it meant, how the conclusion stated therein was arrived at, and that it did not mean, and was not as to him a representation, that the "earnings of said corporation had been and were so great that there was a net profit annually of 12 per cent. on the $250,000 of capital stock." The declaration gives no intimation that a recovery will be asked for on the sole ground that a representation was made to plaintiff that upon the basis of 38 patients, as the business was being conducted at Northville, a stated profit was being made, which representation was false, because the expenses figured and stated were not all of the expenses. The variance between declaration and proof is clear. Is it fatal? The rule is that the objection of variance must be made in the trial court. It does not appear from the record that the question was raised except by a request to charge preferred by counsel for defendants:

"Plaintiff had full knowledge concerning the capital stock, and therefore there was no misrepresentation about it, and I further charge you that no such misrepresentation as is alleged concerning the earnings has been proved in this case. Therefore plaintiff cannot recover."

The judgment is for defendants, and the question is whether for any error pointed out it should be reversed. It should not be reversed, whatever the allegations of error, if a correct result has been reached upon undisputed facts and the applicable law. *Robinson* v. *Charles Wright & Co.*, 94 Mich. 283, 285. The request preferred should have been given, unless plaintiff by amendment

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could set up the cause of action which he had proved. This he could not do, because it is a new and distinct cause of action which arose in 1892, which at the trial in 1905 was barred by the statute of limitations.

The judgment is affirmed.

McALVAY, C. J., and CARPENTER, GRANT, and BLAIR, JJ., concurred.

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152 417

PEARCE *v.* QUINCY MINING CO.[1]

1. JURY—COMPETENCY—PERSON EMPLOYED BY PARTY.
   A person in the employ of one of the parties is incompetent to sit as a juror.
2. SAME—HARMLESS ERROR.
   Where there is no claim that an impartial jury was not secured, a judgment will not be reversed because the court overruled a challenge to an incompetent juror, though the party objecting challenged him peremptorily, and used all his peremptory challenges.
3. MASTER AND SERVANT—DEATH OF SERVANT—ACTION—ISTRUCTIONS—SUFFICIENCY.
   In an action against a mine owner for the death of a minor servant caused by a fall of rock in the mine, instructions as to negligence, contributory negligence, duty to warn, and deceased's knowledge of the danger, examined, and *held*, correct and applicable to the case.

Error to Houghton; Streeter, J. Submitted June 11, 1907. (Docket No. 63.) Decided July 1, 1907.

Case by James H. Pearce, administrator of the estate of Timothy Sullivan, deceased, against the Quincy Min-

[1] Rehearing denied October 4, 1907.

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ing Company for the negligent killing of plaintiff's intestate. There was judgment for defendant, and plaintiff brings error. Affirmed.

This is an action of tort, based upon the alleged negligent killing of plaintiff's intestate, Timothy Sullivan. Timothy, at the time of his death, was a little over 16 years and 2 months old. The declaration alleges that he "was an intelligent, ambitious, strong, and healthy boy, and accustomed to earn large wages." He was killed by a fall of rock from a hanging wall. The claim of negligence in the declaration is that, without warning, instruction, or explanation, the deceased was sent to work in a place where there was latent or extraordinary danger; that "the place was attended by latent or extraordinary danger, as hereinbefore stated, in that blasting had been, and was being, done in said stope or place, and the hanging wall of said stope or place might be or become loose, and rock or earth might become detached from said hanging wall and fall upon persons working there and injure them." The deceased entered the employ of the company September 7, 1904, and was killed December 6, 1904. He had previously worked one month in another mine. He was what was called a "pony boy," i. e., his first employment was mainly to run a pony engine. The evidence establishes the fact that these boys are also employed at other work. They run errands, help to clean out the stopes, and do other work. That is the manner in which boys learn to become miners. His own brother, a miner, working in the same mine, testified:

"I know when the pony stopped running that Tim was doing something else."

The testimony of other miners is:

"There is no boy hired for any one purpose. He runs a pony when it is needed; otherwise he works around the mine, * * * cleaning the levels, oiling the tram cars, running dirt for the trammers, carrying drills and water for the miners, filling miners' places. His duties as a

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pony boy bring him into acquaintance with all parts of the mine. He does little jobs that he is able to do around the mine, cleaning up levels, running dirt in stopes, work in a miner's place. * * * It is the custom in mining districts that, after two or three months' experience operating a pony, to work at the foot of stopes."

The deceased and a miner named William Halgreen were employed shoveling dirt or rock from the south part of the stope and wheeling it to a hole and dumping it into the stope below. How the work was done, and how the deceased met his death, appears from the testimony of the miner Halgreen as follows:

"I am 32. I have worked for the Quincy about five or six years altogether at all kinds of work. I couldn't name them all. I have trammed. I have worked as a miner, stemming. I have worked as a timberman. I have worked for the Quincy five or six years, seven different times. I now live in Minnesota. I went there about a month ago. My folks live there. I am farming. I own a farm. I was working in the Quincy on December 6th of last year in the ninth level. I worked with Timothy Sullivan. We shoveled dirt in the wheelbarrow and wheeled the wheelbarrow to the hole. That was on the night the accident happened. There were two company men and the boy and I and four miners working on that night shift in that level. I was working on the south side of the hole. The dirt was about 18 or 20 feet from the hole. The nearest stull timber was about 10 or 15 feet from the hole. I am not sure. There was a broken stull timber in the level that was laying down on the level, the hanging side of the level, about six or eight feet from the hole, south of the hole. I don't know how many shifts Sullivan and I worked there altogether, two or three. I knew Sullivan. I saw him first when he started to work with me. I had a talk with him as to what part of the work he would do. I told him that he had to shovel the dirt into the wheelbarrow, and I would put it into the hole. He didn't do any wheeling. That was too heavy for him. I went to work about half past 6. I noticed two pieces of rock that came down from the hanging that night. The first piece came down about, I couldn't tell sure, about 10 o'clock. It wasn't very large. It was small. I am not sure where the piece came from, but I think it came from

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the hanging; somewhere on the back. It fell so that part of it went into the hole and another fell down close to where Timothy Sullivan was; some of the first ones went into the winze hole and some into the level. It was a small piece. It wasn't as large as my head."

Witness further testified that he told Timothy that he better go away from there; that he might get hurt. The deceased was lying on this timber apparently asleep when the rock fell and killed him. The rock was 40 to 50 feet long, 10 to 15 feet wide, and 3 feet high at the thickest place. It is undisputed that the miners were charged with the duty of testing the rock and determining whether it is safe; had examined it that morning, and had determined that it was solid and safe. The end of the stope where Halgreen was at work was perfectly safe. The case was submitted to the jury, who rendered a verdict for the defendant.

Burritt & Burritt, for appellant.

Hanchette & Lawton, for appellee.

GRANT, J. (*after stating the facts*). 1. The first error assigned is the refusal of the court to excuse a juror who was challenged by the plaintiff because he was an employé of the defendant. We are cited to no case in this court which decides the question. Counsel for defendant rely on *Goodrich* v. *Burdick*, 26 Mich. 39, where the defendant's clerk was excused by the court. It was there said, the court speaking through CHRISTIANCY, C. J.:

"Though it might not have been erroneous for the court to have allowed Stewart, the clerk of the defendant, to sit as a juror, no other cause being shown against him, there was no error in rejecting him for this cause, and we think his rejection judicious and proper."

Probably the reason that the question has not before been raised is because courts usually excuse a juror who occupies a business relation to either of the parties liti-

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gant. The question, however, has frequently arisen and been decided in other jurisdictions, and the cases, which are numerous, almost, if not quite, universally hold that such a person is incompetent to sit as a juror. 24 Cyc. p. 276; 17 Am. & Eng. Enc. Law (2d Ed.), p. 1127. Numerous cases are there cited. Jurors should be strictly impartial. Undoubtedly, many employés would be. Many employers might wish them to be. But a verdict in favor of the employer would not be satisfactory to the opposite party. The verdict would be subject to criticism. It would place the juror in an unpleasant position. It is a wise policy which prohibits such persons sitting as jurors. We think the law disqualifies them.

The objectionable juror, however, was peremptorily challenged by the plaintiff, and no claim is made that a perfectly impartial jury was not afterwards obtained. The sole ground, therefore, for reversing the case, is that the plaintiff exhausted all his peremptory challenges, and, if this juror had been excused for cause, he might have had one more peremptory challenge. There are decisions for reversing cases under such circumstances. Among them is one by this court. *Theisen* v. *Johns*, 72 Mich. 285. The question was disposed of by the statement that:

"It will not do to say that this error was cured by the fact that counsel afterwards challenged the jury peremptorily, as it appears from the record that counsel upon both sides exhausted their peremptory challenges. There may have been others upon the jury whom counsel might desire to challenge peremptorily, and have been unable to excuse by reason of having exhausted his challenges."

We think that, when the parties have obtained a competent and impartial jury, there is no good reason in setting that verdict aside and granting a new trial, because the judge erred in retaining upon the jury one who was in fact disqualified, but who was afterwards peremptorily challenged. An impartial jury is all that a party is entitled to, and when he has obtained that he has no valid

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ground for complaint. Where a qualified juror was excused, this court said:

"So long as an impartial jury is obtained, neither party has a right to complain of this course by the court." *Atlas Mining Co.* v. *Johnston*, 23 Mich. 36.

See, also, *Luebe* v. *Thorpe*, 94 Mich. 268. We therefore overrule that case upon this point.

2. The court, as requested by the plaintiff, stated to them fully the theory of the plaintiff's case. This theory was repeated in various forms, one of which will be found in the excerpt from the charge, printed in the margin.[1] After giving these requests, the circuit judge said to the jury that they must be satisfied by a fair preponderance of the evidence of two propositions: (1) that the defendant was guilty of negligence; and (2) that the plaintiff's intestate was not guilty of contributory negligence; that the duty to warn the deceased was imposed upon the defendant, but, if the deceased knew of and appreciated the danger, that was sufficient; that if the defendant was guilty of negligence, and the deceased used the care that an ordinary, prudent, and intelligent person of his age, knowledge, and experience would use, plaintiff was entitled to recover. He also instructed them that liability could not be based upon sympathy. The last instruction appears to have been prompted by the remarks of counsel to the jury. It is these remarks, in summing up the case to the jury, of which plaintiff's counsel complain. We find no error in them. The propositions were all correct, and were all applicable to the case.

[1] "If you find from the evidence that deceased was young and inexperienced, and that the place where he was working when killed was attended by danger, and that the danger was known, or should have been known, to the defendant, and was not fully known to deceased, and was not fully apparent to a person of his age and experience, or was not fully appreciated by him, and that his incompetency to judge of such danger and fully appreciate the same was known, or should have been known, to the defendant, then the burden of proof is on the defendant to prove to your satisfaction by a preponderance of evidence that it did fully inform, warn, and instruct deceased concerning such danger, so that he might have fully understood and appreciated the same and have exercised care in proportion to such danger."

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3. Plaintiff made a motion for a new trial upon the grounds: (*a*) That the verdict was against the weight of the evidence; (*b*) that the court erred in his instructions to the jury; (*c*) because an employé of the defendant talked with one of the jurors during the trial, for the purpose of influencing him. The motion was overruled, and, we think, very properly. The verdict was not against the weight of the evidence. The affidavit upon which the talk with a juror is based was denied by the employé and by the juror. Some other errors are assigned which have had full consideration. They are unimportant, and it is sufficient to say that they are without merit.

The judgment is affirmed.

McALVAY, C. J., and CARPENTER, HOOKER, and MOORE, JJ., concurred.

FARRAR *v.* LONSBY LUMBER & COAL CO.

1. FRAUDULENT CONVEYANCES — SALES IN BULK — STATUTE — VIOLATION — EFFECT BETWEEN PARTIES — LIEN FOR PRICE.

   A sale by a merchant of practically his entire stock in trade in bulk in violation of Act No. 223, Pub. Acts 1905, is void, not only as to creditors, but between the parties, and the bill of sale cannot be given effect as a chattel mortgage on the goods for the purchase money.[1]

2. EQUITY — RELIEF — CLEAN HANDS.

   One who has purchased practically the entire stock in trade of a merchant in bulk, in violation of Act No. 223, Pub. Acts 1905, does not come with clean hands into a court of equity as an intervener to establish his title to the property as against the receiver of the seller.

[1] As to validity and construction of statutory requirements on sale of stock of goods in bulk, see note to *Everett Produce Co.* v. *Smith* (Wash.), 2 L. R. A. (N. S.) 331.

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Appeal from Macomb; Law, J., presiding. Submitted June 11, 1907. (Docket No. 84.) Decided July 1, 1907.

Bill by Judson S. Farrar and others against the Lonsby Lumber & Coal Company, Limited, Fred Breitmeyer, and others, to restrain the managers of defendant association from disposing of its property, for an accounting, and the appointment of a receiver. Spencer J. Dalby and A. Frank Sarns, copartners as the Lakeside Ice & Coal Company, filed a petition to intervene to establish their title to certain goods. From a decree for complainants, interveners appeal. Affirmed.

The issue in this case is clearly stated by the learned circuit judge as follows:

"On January 13, 1906, the Lonsby Lumber & Coal Company, Limited, a partnership association, was insolvent.

"On that day some negotiations were had relating to the sale of about 900 tons of soft coal and about 400 cords of wood to Dalby & Sarns, copartners under the name of the Lakeside Ice & Coal Company. On January 15, 1906, the sale was consummated, and a bill of sale of this property delivered by the officers of the Lonsby Lumber & Coal Company to Dalby & Sarns. No cash was paid, but the vendees gave three notes for the purchase price—two for $1,000 each and one for $1,130—which notes are now in the hands of two banks in the city of Mt. Clemens. The property included in this sale was substantially the whole stock in trade of defendant association, except 386 tons of Jackson Hill coal and 2,000 bushels of charcoal which had been seized on January 12th under a writ of attachment in a suit brought by creditors.

"On January 18th three of the stockholders of the Lonsby Lumber & Coal Company filed the bill of complaint in this cause against this association, in which, among other things, mismanagement of the affairs of the association is alleged against four of the managing stockholders who are the officers, who are also made defendants. The bill of complaint asks for an order restraining the managing officers from disposing of the property of the association; for an accounting; for the appointment

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of a receiver; and for other relief. A temporary restraining order was made on the day the bill was filed in accordance with the prayer of the bill. On January 24th a receiver was appointed. On the date of his appointment the receiver took possession of the property which the Lonsby Lumber & Coal Company had attempted to transfer by bill of sale to Dalby & Sarns, except about 37 tons of coal which the vendees had removed between January 15th and January 24th.

"Since the filing of the bill of complaint some of the creditors of the Lonsby Lumber & Coal Company have been permitted to intervene, and answer has been filed by the defendants, an inventory has been filed by the receiver, a steamboat belonging to the defendant association has been sold by the receiver as ordered by the court, and a report made by him of such sale. Dalby & Sarns have now filed a petition asking leave to intervene, and that the receiver be ordered to deliver to them the property which they claim to have purchased on January 15, 1906, from the defendant association, or, in the event this is refused, that the court order a lien in their favor upon the property less the value of the 37 tons of coal now in their possession.

"On the filing of this petition the court made an order permitting Dalby & Sarns to intervene, and providing that the receiver show cause why the prayers of petitioners should not be granted. The defendant partnership association has filed an answer to the petition of Dalby & Sarns, admitting that they are entitled to the relief for which they pray, and the receiver and the complainants have filed answer denying their right to such relief."

A hearing was had and a decree entered for the complainants, decreeing that the sale was void under Act No. 223, Pub. Acts 1905, that the notes be declared null and void, and the petitioners required to account for the sale of the 37 tons of coal of which they had taken possession.

John A. Weeks, for complainants.

Robert F. Eldredge, for defendant receiver.

Martin Crocker, for appellants.

GRANT, J. (*after stating the facts*). Act No. 223

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known as the "sales-in-bulk act," was held valid by this court in *Spurr* v. *Travis*, 145 Mich. 721.

Counsel for the petitioning appellants appears to concede that under that act the sale was void, but claims that the receiver should either return the petitioners' notes or pay them with the money derived from the sale of the goods. He also contends that the bill of sale should be treated as a mortgage. Neither of these contentions can be sustained. Otherwise a quick and easy way to completely avoid the statute would be furnished. A sale void as to creditors cannot, as between the parties, be made to operate to give the vendee a lien for the money he has paid. 4 Am. & Eng. Enc. Law (2d Ed.), p. 189. These petitioners acted in violation of the law. They are not before a court of equity with clean hands. They are not in position to ask for any remedy in a court of equity. The holders of the notes in question are not now before the court, and their rights cannot be determined in this proceeding. If they present their notes to the court for allowance against the estate of the company as indorser, the question will then arise for determination whether they are holders in due course and for value.

Decree affirmed, with costs.

MCALVAY, C. J., and CARPENTER, HOOKER, and MOORE, JJ., concurred.

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PEOPLE, *ex rel.* ATTORNEY GENERAL, *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. JUDGMENT—RES JUDICATA—PLEA.
   The question of res judicata cannot be raised by a motion to quash an information filed by the attorney general, but only by a plea in bar.

2. ABATEMENT—ANOTHER ACTION PENDING—NATURE OF PROCEEDINGS.
   The pendency of other suits against a corporation involving the same questions is not ground for quashing an information in the nature of quo warranto brought to test the right of the corporation to exercise its franchises as a corporation, none of the other suits having been brought for that specific purpose.

3. QUO WARRANTO—INFORMATION—LEAVE TO FILE—APPLICATION—SHOWING—NECESSITY.
   The procedure prescribed in quo warranto cases brought under sections 9966 and 9967, 3 Comp. Laws, is not applicable to cases in which the attorney general asks this court, or a justice thereof, for leave to file an information against a corporation under section 9951, 3 Comp. Laws, and the court, or a justice thereof, may, in its discretion, grant such leave without notice to the respondent, and without any further showing than the facts set up in the verified information.

Quo warranto proceedings by the people of the State of Michigan, on the relation of John E. Bird, attorney general, to inquire into the right of the Detroit, Grand Haven & Milwaukee Railway Company to exercise certain franchises: On motion to quash. Submitted June 11, 1907. (Calendar No. 22,078.) Denied July 1, 1907.

H. Geer and *L. C. Stanley*, for the motion.

Roger Irving Wykes, contra.

GRANT, J. The attorney general presented to the Chief Justice of this court a duly verified information to

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inquire into the right of the respondent to exercise franchises or privileges not conferred upon it by law, and also to forfeit its charter and franchise for noncompliance with the act creating it. The Chief Justice granted leave to file the information. The respondent now moves to quash, because (1) the leave to file the information was improvidently granted; (2) no notice was given to the respondent of relator's intention to make such application; and (3) because no proper showing was made by affidavits or otherwise for leave to file it. The statute upon the subject is section 9951, 3 Comp. Laws, which reads as follows:

"Leave to file such information may be granted by the Supreme Court in term time, or by any justice thereof, but by no other officer, upon the application of the attorney general in vacation; and such court or justice may, in their discretion, direct notice of such application to be given to such corporation or its officers, previous to granting such leave, and may hear such corporation in opposition thereto."

The information charges the respondent with unlawfully exercising certain franchises and privileges, to wit:

"1. All of the rights, franchises, and privileges at one or any time belonging to or possessed and exercised by the Detroit & Pontiac Railroad Company and conferred upon it by the act of the legislative council of the Territory of Michigan, March 7, 1834 (3 Terr. Laws, p. 1287), and amendments thereto.

"2. All of the rights, privileges, and franchises at one or any time belonging to or possessed and exercised by the Detroit & Milwaukee Railway Company and conferred upon it by Act No. 140 of the Laws of 1855 of Michigan and by the act of the legislative council of the Territory of Michigan of March 7, 1834, and amendments thereto.

"3. The right, privilege, and franchise claimed to be conferred upon it by section 16 and other sections of the act of the legislative council of the Territory of Michigan of March 7, 1834, to perpetually fix and regulate its own tolls and charges without legislative interference, or regu-

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lation or limitation as to reasonableness of rates, tolls, or charges.

"4. The right, privilege, and franchise of perpetually paying the limited rate of taxation fixed by Act No. 140 of the Laws of 1855, to be paid and measured upon the capital stock of the Detroit & Milwaukee Railway Company.

"5. The right, privilege, and franchise to extend the rate of taxation fixed in and by Act No. 140 of the Laws of 1855, and therein conferred upon the Detroit & Milwaukee Railway Company to the portion of the said railroad belonging, previous to 1855, to the Oakland & Ottawa Railway Company and extending from the city of Pontiac in the county of Oakland to the city of Grand Haven in the county of Ottawa, as well as the right to exercise this exemption as a perpetual right, privilege, and franchise.

"6. The right, privilege, and franchise to exercise the right of eminent domain as conferred and granted in said act of the legislative council of the Territory of Michigan of March 7, 1834.

"7. The right, privilege, and franchise of perpetual exemption from the provisions of the Michigan general railroad law, as to all parts of the railroad now operated or hereafter acquired by it, pursuant to law.

"8. The right, privilege, and franchise of a contract with the State, as embraced in and constituted of the act of the legislative council of the Territory of Michigan of March 7, 1834, and of Act No. 140 of the Laws of Michigan of 1855, exempting it from legislative interference with regard to the regulation of its own tolls and charges, with regard to the alteration in the tax rate claimed to be fixed by said acts, and with regard to the other rights, powers, and immunities claimed to be conferred and enjoined under the provisions of said acts.

"9. The right, privilege, and franchise of an exemption from the provisions of Act No. 173 of the Public Acts of 1901, and from any and all prior or subsequent general acts of the legislature of the State of Michigan, fixing the tax rate to be paid upon the property or measured upon the gross earnings of railway or railroad companies, except the Act No. 140 of the Laws of Michigan of the year 1855.

"10. The right, privilege, and franchise of continuous

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perpetual succession to the charters composed of the act of the legislative council of the Territory of Michigan of March 7, 1834, and of Act No. 140 of the Laws of the State of Michigan of 1855, and to the rights, privileges, franchises, exemptions, immunities, and powers thereby created or conferred.

"11. The right, privilege, and franchise to exist as the successor to the property, charter, franchises, rights, privileges, and immunities of the Detroit & Pontiac Railroad Company and the Detroit & Milwaukee Railway Company, and to the special charters of either or both of them as claimed to be conferred by Act No. 96 of the Laws of 1859.

"12. The right and privilege of immunity from the passage and application of such acts of the legislature of the State of Michigan as Act No. 5, of the October Special Session of 1900.

"13. And that, in addition to the above, the said Detroit, Grand Haven & Milwaukee Railway Company, as such corporation, has offended against the provisions of the act or acts creating, altering or renewing it as such corporation."

The learned counsel for the respondent claim that certain of the questions are res judicata. The question of res judicata can be raised only by plea in bar. *Briggs* v. *Milburn*, 40 Mich. 512.

It is claimed also that certain other suits, brought against the respondent, involve the same questions here raised. If this be true, it is also true that they are not raised in a direct proceeding to test the right of the respondent to exercise its franchises as a corporation.

Counsel cite *Vrooman* v. *Michie*, 69 Mich. 44. That case was brought under sections 9966 and 9967, 3 Comp. Laws, and is applicable to cases brought under that statute. It does not govern cases where the attorney general asks this court or a justice thereof for leave to file an information.

The questions raised are important, and we see nothing to indicate that the relator is actuated by a desire to institute vexatious proceedings, or to again try questions

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which have been once adjudicated. The Chief Justice exercised the discretion reposed in him by the law, and we see no occasion to interfere with it.

The motion is denied.

McALVAY, C. J., and CARPENTER, HOOKER, and MOORE, JJ., concurred.

MULHOLLAND *v.* IDEAL MANUFACTURING CO.[1]

MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action against a master by a servant for personal injuries resulting from getting caught in the knives of a jointer, evidence examined, and *held*, that plaintiff's carelessness in attempting to clean the accumulated chips and dust from the defective suction pipe of the machine without stopping it contributed to his injury, and that a verdict should have been directed for defendant.

Error to Wayne; Donovan, J. Submitted June 12, 1907. (Docket No. 18.) Decided July 1, 1907.

Case by Wallace B. Mulholland against the Ideal Manufacturing Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Keena, Lightner & Oxtoby, for appellant.

Frederic T. Harward, for appellee.

MOORE, J. The plaintiff lost a portion of his right

[1] Rehearing denied October 4.

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hand while employed at the defendant's factory. Upon the trial of the case in the Wayne circuit court he recovered a verdict for the sum of $7,000. The circuit judge denied a motion for a new trial and entered judgment on the verdict. The writ of error in this case was issued to review this judgment.

The errors assigned may be grouped as follows:

1. The verdict should have been directed for defendant.
2. The alleged negligent acts of defendant, relied on by plaintiff in this case, were not the proximate cause of plaintiff's injuries.
3. Plaintiff assumed the risks incident to the work in which he was engaged when he was injured.
4. Plaintiff was guilty of contributory negligence, which was the cause of his injuries.
5. Errors in the court's rulings.

In our view of the case it is necessary to discuss but one of these groups of assigned error.

No testimony was introduced on the part of defendant, except some photographs of the machine which inflicted the injury and its environment. In addition to his oral testimony, plaintiff introduced a wood cut of the machine in evidence. The record discloses without dispute the following situation: When plaintiff entered the employ of defendant, he was about 20 years of age. He worked for about 3 weeks upon a planing machine. He was then set to work upon the jointing machines, working first upon one and then upon the other alternately. This machine operates substantially as follows: There is upon the upper portion of the frame-work of the machine two sets of knives, about one foot apart, which knives make about 3,000 revolutions a minute. There is a movable bed to the machine nearly a foot wide. Upon each side of this bed a board is clamped, with one edge down. When the boards are in place, the operator puts his foot upon a treadle, which sets in motion a cogwheel, which is midway between the rotating knives and somewhat nearer the movable bed of the machine. When the cog-

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wheel is set in motion, the cogs upon it engage with cogs upon the lower side of the movable bed of the machine. It and the boards clamped upon the sides thereof are carried forward, so that the lower edges of the boards pass over the rapidly rotating knives. Upon the edge of one of the boards is cut a tongue, and into the edge of the other board is cut a groove. When this is done the boards are removed, the treadle is pressed by the foot of the operator, which brings the movable bed into position so that two more boards may be clamped thereon, and the operation repeated. The knives are set in motion by means of a belt, which is pushed from a movable pulley to one that is fast. The cogwheel is kept in motion by keeping the foot of the operator upon the treadle. Coming up through the floor under each of these machines is a pipe, which terminates with a flaring end under the two sets of knives. This pipe is attached to the main suction pipe of the building under the floor, and when in good condition sucks away the chips and dust caused by the operation of the machine. The pipe under one of these machines became detached just under the floor upon five occasions before the time of the accident. At such times the chips and dust would fill the upper end of the pipe, run over on the floor, and clog the machine. Upon the first of these occasions the foreman showed the plaintiff how tc attach the pipes together, and told him to remove the chips and dust with a stick, which he did. The foreman promised the plaintiff to fix the pipe so it would not separate. It is also claimed he made a like promise at each of the other times, and that plaintiff relied upon these promises. At about 5 o'clock of the day when plaintiff was injured the pipe separated, the upper end filled up, and the chips and dust piled up on the floor and clogged the machine. The plaintiff left the knives running, went under the floor, and attached the pipe where it had been separated. Returning to the machine, he put his foot upon the treadle, setting the cogwheel in motion, took a stick about the size of a lath and about two feet

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long in both hands, and began to poke the end of it into the funnel end of the suction pipe for the purpose of removing the chips and dust which clogged the pipe. His shirt sleeve came too near the rotating cogwheel, his hand was drawn upon the revolving knife, and the mischief was done.

It is claimed by plaintiff that he left the knives revolving and set the cogwheel in motion while doing this work, so they would clear themselves of chips and dust, and that it would be difficult to clear out the machine if they were stopped. As to why he did not stop the knives and cogwheel, the following appears upon his redirect examination:

"*Q.* Why didn't you do it?

"*A.* Because the machine was running, and it would clean more readily, and I was working piece work, and wanted to do it as quick as I could.

"*Q.* Cleaned more readily?

"*A.* Yes, sir.

"*Q.* Could you get your hand down in there by the wheels and the gear to clear it out?

"*A.* No, sir; I could not.

"*Q.* But when the wheels were going—revolving, that is, like this—you poked it out?

"*A.* Yes, sir.

"*Q.* And that is the way you did it?

"*A.* Yes, sir."

Counsel for plaintiff contends, and we quote from the brief:

"The filling up of the machine with shavings, owing to defective suction pipe, blinded and confused plaintiff as to the exact location of the gear wheel and knives, and was the approximate cause of his injuries."

When the accident occurred, plaintiff had been at work upon the two machines nearly four weeks. He knew perfectly well how to shift the belt to the movable pulley and thus stop the knives. He knew all about setting the cogwheel in motion. He knew the exact location of the cog-

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wheel and of the revolving knives. He knew the exact situation better than any one else. It was an extremely careless thing to do what he did do. It would be a misuse of words to say that his carelessness did not contribute to his injury. See *Kean* v. *Rolling Mills*, 66 Mich. 277, 285, 288; *Hathaway* v. *Milling Co.*, 139 Mich. 708; *Martin* v. *Lumber Co.*, 141 Mich. 363. A verdict should have been directed in favor of defendant.

Judgment is reversed, and new trial ordered.

McALVAY, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

PEOPLE *v.* HENZE.

INTOXICATING LIQUORS—KEEPING OPEN ON SUNDAY—WHAT CONSTITUTES.

Under section 5395, 2 Comp. Laws, requiring that saloons shall be kept closed on Sunday, a saloonkeeper is guilty who enters his saloon on Sunday to fix the fires, empty the pans under the refrigerators, light the lights, and prepare his meals in an adjoining kitchen, though he has no other place in which to prepare his meals, no liquors are ever served in the kitchen, and no person other than himself enters on Sunday.

Exceptions before judgment from the superior court of Grand Rapids; Stuart, J. Submitted June 13, 1907. (Docket No. 120.) Decided July 1, 1907.

Fred W. Henze was convicted under section 5395, 2 Comp. Laws, of keeping his saloon open on Sunday. Affirmed.

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Dunham & Malcolm, for appellant.

John S. McDonald, Prosecuting Attorney, for the people.

MOORE, J. The respondent was convicted of the offense of keeping his saloon open on Sunday. The sole question involved is whether or not this saloon was open on that day, within the meaning of section 5395, 2 Comp. Laws, which statute, so far as applicable, is as follows:

"All saloons, restaurants, bars, in taverns or elsewhere, and all other places, except drug stores, where any of the liquors mentioned in this act are sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday, * * * until 7 o'clock of the following morning. * * * The word 'closed' in this section shall be construed to apply to the back door or other entrance as well as to the front door."

The following statement of facts is substantially taken from the brief of counsel for respondent:

The respondent is a single man. His sleeping room was on the second floor over his saloon. There was no inner stairway. His sleeping room was reached by an outside stairway. On the Sunday morning in question Mr. Henze arose and went down stairs into his saloon to fix the fire, empty the pans under the refrigerator, and get his breakfast. After he had eaten his breakfast he went to church at 10:30. On returning from church he again went to and into his saloon, got his dinner, and then went to visit a friend, one Fred Platte, at the latter's rooms, where he remained until about 5 o'clock. About 6 o'clock he again went to his saloon and fixed the fire and lit the lights in the front of his saloon, where he remained until about 7:30. He then left his saloon and went to church, getting there about 7:30. Returning from church at about 8:30, he again went into his saloon and got his supper, after which he went across the street to the drug store, where he spent the evening. At about 20 minutes to 11 p. m. he went back to his saloon, fixed the fire in his

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stove, emptied the pans under his refrigerator, and then went up to his room and retired for the night. The only premises respondent occupies is his saloon and sleeping room above it. He prepares all his own meals in a room off the rear of his saloon. There is an ordinary door between this kitchen of defendant and his saloon. The kitchen is about 8 feet by 12 feet, and in it no liquors are ever served. It is used for no other purpose than in which to prepare defendant's meals and lunches, which are served out in his saloon proper. There is no way to reach this kitchen, except from the saloon; there being no outside doors between the outside and defendant's kitchen. On the Sunday morning in question no person was in the saloon other than the defendant.

Under this state of facts it is claimed the saloon was closed within the meaning of the statute. We cannot agree with this contention. The case is governed by the recent case of *People* v. *Tolman*, 148 Mich. 305, and the cases cited therein.

The conviction is affirmed.

McALVAY, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

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IDEAL MANUFACTURING CO. *v.* LUDWIG.

INJUNCTION—VIOLATION—STRIKE—INTIMIDATION — WHAT CONSTITUTES.

An injunction restraining the officers and members of a trade union from intimidating the employés of complainant, against whom a strike is in progress, is violated by the president of the union saying to a workman being escorted through a crowd of strikers by an officer, "I see you are still doing your dirty work."[1]

Certiorari to Wayne; Brooke and Mandell, JJ. Submitted June 13, 1907. (Docket No. 127.) Decided July 1, 1907.

Bill by the Ideal Manufacturing Company against Martin Ludwig and others to enjoin an interference with complainant's business: On petition, Martin Ludwig was adjudged guilty of contempt in violating the temporary injunction, and sentenced to imprisonment for ten days in the county jail. Affirmed.

The respondent was found guilty of contempt of court in violating the injunction which the court had issued in the case of the *Ideal Manufacturing Company* v. *Martin Ludwig and others.* The injunction restrained the respondent and others from:

"1. In any manner unlawfully interfering with the employés of the Ideal Manufacturing Company, complainant herein, now in the employ of complainant, and from in any unlawful manner interfering with any person who may desire to enter the employ of the Ideal Manufacturing Company, by the use of threats, intimidation, personal violence, or other unlawful means calculated or intended to deter or prevent such person or per-

[1] As to the law relative to picketing, see note to *Jensen* v. *Cooks' & Waiters' Union* (Wash.), 4 L. R. A. (N. S.) 802.

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sons from entering or continuing in the employment of the Ideal Manufacturing Company, or calculated or intended to induce any such person or persons into leaving the employ of the said Ideal Manufacturing Company.

"2. From congregating, gathering, assembling, lingering, or loitering about or in the neighborhood of the premises upon which the Ideal Manufacturing Company is engaged in carrying on its business, or at other places, with intent to unlawfully interfere with the employés of the said Ideal Manufacturing Company, or with the prosecution of their work, or to unlawfully interfere with or intimidate or threaten the employés of the Ideal Manufacturing Company, with intent to cause them to leave the employment of said company, or to interfere with or obstruct in any unlawful manner, the business and trade of said Ideal Manufacturing Company.

"3. From interfering with the free access of the employés of the said Ideal Manufacturing Company to the premises on which the company is engaged in carrying on and conducting its business in their places of work, and likewise from interfering with the free return of the said employés to their homes or places of business.

"4. From giving any directions or orders, through associations, committees, or otherwise, for the performance of any such unlawful acts or threats or acts of intimidation hereinbefore enjoined, and from in any unlawful manner, whatever, impeding, obstructing, or interfering with the regular operation and conduct of the business of said Ideal Manufacturing Company.

"5. From interfering, intimidating, boycotting by the distribution of circulars or otherwise, or otherwise molesting or threatening in any manner the employés or patrons of the said Ideal Manufacturing Company, or any other person or persons, for the purpose, by means of such interference, intimidation, threats, or boycotting, of inducing such person or persons not to do business or deal with or transact business with said Ideal Manufacturing Company.

"6. From the performance of any acts, threats, or acts of intimidation hereinbefore enjoined, and from obstructing or interfering, by boycotting or otherwise, or by any acts of intimidation or coercion, with the regular conduct and operation of the business of the said Ideal Manufacturing Company, and from preventing, by these means, said company from carrying on its business, until the further order of this court."

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George F. Monaghan and *Peter J. Monaghan*, for complainant.

Dohany & Dohany, for respondents.

GRANT, J. (*after stating the facts*). The facts in this case are very similar to those in *Beck* v. *Protective Union*, 118 Mich. 497 (42 L. R. A. 407).

The complainant is carrying on a large manufacturing establishment, employing from 300 to 350 men. Among its workmen are those known as "metal polishers." There is a union known as "Metal Polishers' Union No. 1," of which respondent Ludwig was president. This union demanded of their employer that it discharge a workman because he did not belong to the labor union. In other words, complainant claimed the right to employ its workmen without dictation from any union or other association. The labor unions claimed the right to dictate whom the complainant should employ. Complainant refused to comply with the demand, and a strike was ordered by the unions. Pickets were established in the streets around the complainant's manufactory, crowds of union men, to the number sometimes of 300, gathered in the streets, particularly at morning, noon, and night, to intercept and intimidate the complainant's employés, and threats of boycott, etc., were made. To such an extent was this unlawful interference carried on by the union men that 20 policemen were required to protect complainant's employés in going to and from their work. Complainant filed a petition against Ludwig and others, charging contempt of court. They were duly served with the petition and affidavits accompanying it, and with an order to show cause. They appeared, proofs were taken, and the respondent found guilty.

Ludwig and other members of the Metal Polishers' Union followed an employé of the complainant as he was being escorted by a policeman through a crowd. Ludwig walked in front of this employé, and said to him, "I see you are still doing your dirty work." When the officer

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asked him who he meant, he pointed to the employé, and said, "I mean that." Further statement of the facts is unimportant. It is manifest that the attitude of the crowd, composed of union men, was hostile, threatening, and intended to intimidate. The claim of Ludwig and his associates that they were *seeking only persuasion* is the baldest subterfuge. The circuit judges of the court below who heard the testimony very properly said:

"It was a perversion of terms to claim, or to believe, that to approach a man surrounded by an unfriendly and menacing crowd and ask him to do or to refrain from doing something is lawful or peaceable persuasion, or is other than an act of intimidation as is specifically and in terms enjoined in this cause. No proofs are necessary to establish the fact that the natural and intended result of such conduct would be intimidation. * * *

"His whole conduct, as sworn to by himself, constitutes, in our opinion, a deliberate disregard of the terms of the injunction with which he had been served prior to the time in question. It is, in our opinion, idle for the respondent to say that his purpose in joining the crowd surrounding Bert Brown was to peaceably solicit Brown's membership in the union. Neither the time nor the circumstances were such as would make such an appeal possible. The claim of the respondent in this respect is, in our opinion, a mere colorable pretext to justify his conduct."

The language we used in *Beck* v. *Protective Union*, supra, is applicable here:

"The law abhors subterfuges, it lays aside the covering, and looks to the actual facts beneath. In the language of Chief Justice Shaw:

"'The law is not to be hoodwinked by colorable pretenses. It looks at truth and reality, through whatever disguise it may assume.' *Com.* v. *Hunt*, 4 Metc. (Mass.) 111, 129.

"Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats. * * *

"To picket complainant's premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways

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and public streets must be free to all for the purposes of trade, commerce, and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk the streets unmolested. It is no respecter of persons; and it makes no difference, in effect, whether the picketing is done 10 or 1,000 feet away.

"It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word 'picket:' 'A body of men belonging to a trades union sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress.' Cent. Dict.; Webst. Dict. The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it."

The court sentenced the respondent Ludwig to serve a period of 10 days in the Wayne county jail. The evidence fully justified the finding of the circuit judges.

The judgment is affirmed.

MCALVAY, C. J., and CARPENTER, BLAIR, and MOORE, JJ., concurred.

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CARPENTER *v.* CARPENTER.

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1. PARENT AND CHILD—CUSTODY OF CHILD— AGREEMENT OF PARENTS—EFFECT.

Though a husband and wife on separating may make a contract for the care of their minor children which will be recognized as valid between themselves, such contract will not be sustained to the detriment of the child, whose interests are of the first consideration.[1]

2. HABEAS CORPUS — REVIEW — CERTIORARI — QUESTIONS CONSIDERED.

On certiorari to review habeas corpus proceedings, brought to obtain the custody of a minor child, the finding of the court below that the welfare of the child will be best subserved by placing it in the care of the mother is a determination of fact conclusive on this court.

Certiorari to Grand Traverse; Mayne, J. Submitted June 14, 1907. (Docket No. 100.) Decided July 1, 1907.

Habeas corpus proceedings by Perlie P. Carpenter against Ora A. Carpenter to obtain the custody of an infant. There was judgment for petitioner, and respondent brings certiorari. Affirmed.

Petitioner and respondent are husband and wife. Disagreements arising between them, they separated and executed articles of separation. They had two children. The older one the wife took, and the younger, by agreement, the father took. They executed an agreement, by which it was agreed that the father "shall retain such custody so long as he gives the child proper care, support, and suitable home surroundings, subject to the right of said Perlie P. Carpenter to visit said child at reasonable intervals." The petitioner filed her petition, asking the

[1] As to validity of contract for transfer of parental responsibility or authority, see note to *Enders* v. *Enders* (Pa.), 27 L. R. A. 56.

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custody of the child, and alleging that the respondent was not providing the child with a suitable home or proper surroundings; that he was not a suitable person to have the care, custody, and education of the child; that the home surroundings of the child were improper and detrimental to his welfare and well-being. A hearing was had, testimony taken, and the circuit judge committed the custody of the child to the mother. The case is before us upon the writ of certiorari to determine the validity of the order of the circuit judge. The decision of the circuit judge is as follows:

"By nature the mother is better fitted than the father to have the care of young children. Our statute, providing that the mother shall have the care of children of tender years, recognizes this fact. For this reason the care of the child is committed to the mother. I will say, however, that from the evidence, and from the appearance of the parties, the father appears to be possessed of more affection and is more tender and sympathetic than fathers usually are. He is in every way fitted, as far as a father can be, to have the care of the child. Notwithstanding these qualities of the father, I am still of the opinion that the best interests of the child will be subserved by intrusting its care to the mother.

"It is to be distinctly understood, however, that the child is to be brought up to respect its father, also its grandparents; and that any act on the part of the mother which tends, or will tend, to cause the child to lose its respect for its father or its grandparents, will be deemed sufficient cause to transfer the custody of the child to the father. The use of such expressions as "Uncle Didley" by the mother or the members of her household, of and concerning the father or grandparents, or applying the term "slave" to the father, or the use of any language which will tend to cause the child to think less of its father, are prohibited, and if made use of will be deemed sufficient reason for giving the custody of the child to the father.

"In addition to the above, the father is to have the right to visit the child at all reasonable times during the daytime, but not later than 8 o'clock in the evening; and, in case the child is ill, immediate notice of such sickness will be communicated to the father, who will be permitted

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to visit the child and obtain for it proper medical care, provided the same has not already been furnished by the mother. Also, the father is to have the right to have the child visit him at his home three Sundays in each month."

Parm C. Gilbert, for petitioner.

Underwood & Umlor and *John W. Patchin*, for respondent.

GRANT, J. (*after stating the facts*). A husband and wife, on separating, may make a valid contract for the care of their minor children. Such contract, while valid between the parties, will not be sustained to the detriment of the minor child, whose interests are of the first consideration. The circuit judge, in his return, finds that the respondent provided for the child in every way as the parties contemplated he would provide at the time they entered into the agreement, and that both are suitable persons to have the care and custody of the child; that the respondent, if awarded the custody of the child, will place him in the home of his father, Theron W. Carpenter, which consists of his wife, an aged lady in poor health, his daughter, a most estimable lady, who is a school teacher, and the respondent. He further returns:

"In arriving at my determination as to the custody of this child, I have considered all the facts in the case as they appear in the evidence, the home surroundings, the peculiar temperament of Theron W. Carpenter, and the natural effect upon the child being brought up under the immediate influence of an adult person mentally constituted as is Mr. Theron W. Carpenter."

Counsel for respondent, in their brief, ask:

"Are we to assume that courts are better qualified to say who shall have the custody of minor children than their natural parents?"

The instant answer to this question is:

"Yes, when it appears that the child is not by the

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parents, or either of them, placed amid proper surroundings."

The judge, from the evidence which is not before us, and from a knowledge obtained by an examination of the witnesses, has found as a fact that the welfare of the child will be best subserved by placing it in the care of the mother. In this proceeding, we can decide only questions of law; the determination of the judge as to the facts being conclusive. *In re Sneden*, 105 Mich. 61; *Corrie* v. *Corrie*, 42 Mich. 509. It is certainly to be hoped that these parents, if they cannot live together in harmony and take care of their offspring as they ought to do, will at least have the good sense to agree to do what is for their children's best interests.

The judgment is affirmed.

McALVAY, C. J., and CARPENTER, and HOOKER, JJ., concurred. MOORE, J., concurred in the result.

POWELL v. DWYER.

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1. SPECIFIC PERFORMANCE—LAND CONTRACT—PENALTY.
   Equity will not permit a party to resist specific performance of a contract to convey land by electing to pay the penalty stipulated therein.

2. SAME—COSTS.
   A claim that affirmance of a decree for specific performance of a contract to convey land should be without costs, on the ground that the deed tendered by complainant for execution did not conform to the contract, is untenable where defendant did not decline performance on that ground, but on the ground, maintained to the last, that he had a right to decline performance on paying the penalty provided in the contract.

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Appeal from Barry; Smith, J. Submitted June 17, 1907. (Docket No. 102.) Decided July 1, 1907.

Bill by Lura Gregory Powell against Mary L. Dwyer, executrix of the last will and testament of John M. Dwyer, deceased, for the specific performance of a land contract. From a decree for complainant, defendant appeals. Affirmed.

Isaac N. Payne (*Colgrove & Potter*, of counsel), for complainant.

John H. McDonald (*Edward S. Grece*, of counsel), for defendant.

MOORE, J. The bill was filed to enforce the specific performance of a written contract reading as follows:

"This agreement, made and concluded this 27th day of January, A. D. 1904, between John M. Dwyer, of Detroit, Michigan, party of the first part, and Lura Gregory Powell, of the same place, party of the second part, *witnesseth:*

"The party of the first part, for the consideration hereinafter mentioned, does for himself, and for his heirs, covenant and agree with the said party of the second part, and her heirs and assigns by these presents, that he, said party of the first part, shall and will, on or before the 3rd of February, A. D. 1904, or as soon thereafter as possible, the same not to exceed ten days, by good and lawful deed or deeds, well and sufficiently grant, convey, and assure unto the said party of the second part her heirs and assigns, in fee simple, clear of all incumbrance, all of that certain tract or parcel of land being and situate in the city of Hastings, county of Barry and State of Michigan, and described as the south sixty-five (65) feet of lots 479 and 480, according to the recorded plat of said city of Hastings, the same being known as the Hotel Barry property and formerly known as the Ford House, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining.

"In consideration whereof, the said party of the second part, for herself and her heirs, does covenant and agree with the said party of the first part, and with his heirs

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and assigns, by these presents that she shall and will, upon the execution of the said deed or deeds as aforesaid, and at the time aforesaid, well and sufficiently grant, convey and assure, unto the said party of the first part, his heirs and assigns, in fee simple, clear of all incumbrance, except mortgages for the sum of sixty-five hundred dollars, all of that certain tract or parcel of land, being and situate in the city of Pontiac, county of Oakland, and State of Michigan, and described as lots 9 and 10 of the original plat of the city of Pontiac, the same containing 120 feet on Perry and Mill streets, and extending back 140 feet along Lawrence street, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining. It is further agreed by both of the parties hereto that an abstract of title shall be furnished with each deed, each abstract to be brought down to date, a new abstract shall be furnished of the hotel property aforesaid, or in lieu thereof the sum of seven dollars will be paid second party.

"And for the true performance of all and every of the covenants and agreements aforesaid, each of the said parties bindeth themselves their heirs, executors and administrators unto the other his or her executors, administrators and assigns in the penal sum of one hundred dollars, to be paid to the party not in default.

"In witness whereof, the parties hereto have hereuntb set their hands and seals the day and year first above written.

"JOHN M. DWYER. [Seal.]
"LURA GREGORY POWELL. [Seal.]"

The court below decreed specific performance as prayed. The case is brought here by appeal.

The solicitors for the defendant say they regard the principal question in the case as turning upon the construction to be given to the clause of the contract reading:

"And for the true performance of all and every of the covenants and agreements aforesaid, each of the said parties bindeth themselves, their heirs, executors, and administrators unto the other his or her executors, administrators, and assigns in the penal sum of one hundred dollars, to be paid to the party not in default."

It is their claim (we quote from brief):

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"It is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty by reference to any pecuniary standard, and where the parties themselves are most intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages than courts or juries from any evidence which can be brought before them, in all such cases the law permits the parties to ascertain for themselves and to provide in the contract itself the amount of damages, which shall be paid for the breach. And the law permits parties to enter into contracts, and holds them binding, where the subject-matter is susceptible of only one ground or basis of damages; and this principle is sustained in all the cases cited, it makes no difference whether the parties call the consideration for the breach 'penalty' or 'damages.'"

It is their further claim that they tendered $100 to complainant, and therefore specific performance cannot be enforced.

The solicitors for complainant insist the court below was right in his construction of the concluding clause of the contract, when he said:

"Under the proof it cannot be claimed that it was agreed upon between the parties as liquidated damages. It seems to be more in the nature of a penalty to be paid by the defaulting party, should anything occur by which either could not perform, and can in no sense apply to the situation as shown by the proof in this case, when it is shown specific performance can be made, but is refused by defendant because of a conception or belief that a more advantageous disposition of the property can be made than by complying with the terms of the contract."

A prominent author states the rule as follows:

"With respect to the effect of a penalty upon the equitable rights of the parties, while a court of equity will relieve the party who has thus bound himself against a penalty, or will restrain its enforcement against him at law, it will not, on the other hand, permit such party to resist a specific performance of the contract by electing to pay the penalty. Where a person has agreed to do a certain act, or to refrain from doing a certain act, and has added

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a penalty for the purpose of securing a performance, a court of equity will, if the contract is otherwise one which calls for its interposition, compel the party to specifically perform, or restrain him from committing the act, as the case may be, notwithstanding the penalty. If the sum stipulated to be paid is really a penalty, the party will never be allowed to pay it, and then treat such payment as a sufficient ground for refusing to perform his undertaking." 1 Pomeroy on Equity Jurisprudence (3d Ed.), § 446.

This is in accordance with the great weight of authority. See *Kettering* v. *Eastlack*, 130 Iowa, 498, in which is cited *Lyman* v. *Gedney*, 114 Ill. 388; *O'Connor* v. *Tyrrell*, 53 N. J. Eq. 15; *Brown* v. *Norcross*, 59 N. J. Eq. 427; *Phœnix Ins. Co.* v. *Continental Ins. Co.*, 87 N. Y. 400; *Hull* v. *Sturdivant*, 46 Me. 34. See, also, Fry on Specific Performance (4th Ed.), §§ 140–164; Waterman on Specific Performance, § 22; *Long* v. *Bowring*, 33 Beav. 585.

In the case of *Daily* v. *Litchfield*, 10 Mich. 29, the complainant sought a specific performance of an agreement for the exchange of lands. The contract contained a clause which reads as follows:

"Either party forfeiting the above contract, by failing to comply therewith, is to forfeit to the opposite party the sum of fifty dollars, as liquidated damages for the nonperformance thereof."

It was claimed by the defendant that by the terms of the agreement the parties had agreed upon the stipulated damages which either party is to pay in case of a breach; that these damages are agreed upon as a substitute for performance; and therefore that either party had the option to perform or to pay the $50 agreed upon. In answer to this claim the court uses the following language:

"It is sufficient answer to this to say that, though the parties have called this sum stipulated damages, yet as it applies to several different stipulations of very different

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degrees of importance, and by the terms of the stipulation would be payable equally on the failure to perform the least as of that to perform the most important, or the whole of them together, it is, in legal effect, but a penalty and not stipulated damages, since it is evident the parties themselves could not have treated it as a mere compensation for actual damages. *Jaquith* v. *Hudson*, 5 Mich. 123. As a penalty it is no objection to specific performance. 2 Dart on Vendors & Purchasers (5th Ed.), p. 1061, and note 1. We must therefore consider the case on pleadings and proofs."

See, also, *Watrous* v. *Allen*, 57 Mich. 362. A case much in point is *Ropes* v. *Upton*, 125 Mass. 258.

In the case before us it appears that neither party to the contract was consulted by the scrivener in relation to the penal clause that was inserted therein. The subject-matter of the contract was of the value of several thousand dollars. The properties involved were situate in cities a considerable distance apart. To act intelligently it became necessary to visit the respective properties, to have abstracts of title made, and to have the latter examined. It is very clear that the parties did not suppose they would be relieved from performing the contract by paying $100, and we think it ought not to be so held.

The solicitors for defendant say:

"Should this court affirm the decree, we submit it should be without costs against the defendant, as it is conceded the deed tendered was not according to the contract," citing *Morris* v. *Hoyt*, 11 Mich. 9.

It is an answer to this contention to say that the refusal to perform the contract was not based upon the failure to tender a deed according to the contract, but was upon the claim made all through the litigation that, if defendant was willing to pay the $100, he was relieved from performing the contract. A deed was tendered before the decree below was made with which no fault is found.

The decree is affirmed, with costs.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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CAMPBELL v. CAMPBELL.

1. DIVORCE—GROUNDS—REFUSAL TO COHABIT.
   Refusal of a wife to cohabit with her husband for three years is extreme cruelty warranting a divorce.

2. SAME—CHARGES OF INFIDELITY.
   The action of a wife in repeatedly without cause accusing her husband of the offense of adultery is extreme cruelty warranting a divorce.

3. SAME—ALIMONY—DIVISION OF PROPERTY.
   Where a husband was given a divorce on the ground of extreme cruelty, and the wife was possessed of property of the value of $1,488, and the husband property of the value of $12,200, a decree allowing her to keep all her property and all the household goods, and requiring him to pay her $5,000, is not unfair to her, there being no children to support.

Appeal from Wayne; Rohnert, J. Submitted June 18, 1907. (Docket No. 112.) Decided July 1, 1907.

Bill by Henry Campbell against Sarah A. Campbell for a divorce. From a decree for complainant, defendant appeals. Affirmed.

George X. M. Collier, for complainant.

Richard I. Lawson, for defendant.

MOORE, J. The bill of complaint in this cause was filed praying for divorce on the ground of extreme cruelty.

The complainant alleges in his bill that since November 16, 1903, the defendant has absolutely refused to occupy the same sleeping room and refused to cohabit with him; that she refused to prepare his meals, attend to and care for his sleeping room, clothes, and washing; that she took up the carpet in his sleeping room, and, when requested by him to replace it, as it was uncomfortable in cold weather, replied that the bare floor was good enough

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for him; that the defendant took from the complainant's bed two new blankets he had purchased to make himself comfortable, and would not let him have them; also that the defendant has frequently charged him with infidelity, without just cause, and has charged him with keeping the society of bad women.

The defendant answered, denying the acts of cruelty charged, and alleged that the cause of their domestic unhappiness was the fault of the complainant, in that the complainant has set about with deliberation to divorce the defendant. The parties were married January, A. D. 1865, in Nankin, Mich. The defendant lived with complainant as husband and wife until November 16, 1903. There were two children born to them. The case was heard in open court. The case is brought here by appeal.

Some of the alleged acts of cruelty are explained by the defendant, but the record discloses that for three years defendant refused to cohabit with complainant. He testified unqualifiedly that she refused to cohabit with him. In her testimony the defendant said:

"The reason that I have not occupied the same bedroom with Mr. Campbell for the last three years is because he is not as I thought he should be."

When she gave her testimony, she then expressed a willingness to resume her marital relations with him. Refusal of cohabitation has repeatedly been held to be a ground for divorce. *Menzer* v. *Menzer*, 83 Mich. 319; *Whitaker* v. *Whitaker*, 111 Mich. 202. The testimony clearly shows that defendant repeatedly accused complainant in the presence of others with the offense of adultery. The following occurred in her examination as a witness:

"*Q.* Why did you tell Miss Stanners that he was going with bad women?

"*A.* Because I supposed he was."

The record is barren of testimony which would warrant the inference of adultery. We think the court was right

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in granting the decree. See *Whitmore* v. *Whitmore*, 49 Mich. 417; *Donaldson* v. *Donaldson*, 134 Mich. 291.

Complaint is made in relation to the disposition of the property. Inventories of the property owned by the respective parties were filed. These showed the wife to have property valued at $1,488 and the husband to have property of the net value of $12,200. The decree allows defendant to keep all her property, gives her all the household furniture, and requires the husband to pay her $5,000. There are no children to be supported. We think defendant cannot complain of this division of property.

The decree is affirmed.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

LOVE v. FLITCRAFT.

JUDGMENT — RES JUDICATA — JUDGMENTS OPERATIVE AS BAR—DIVISIBLE CAUSE OF ACTION.

Plaintiff brought attachment against defendant and declared for two payments on a building contract only one of which was shown by the proofs to be due at the time of suing out the writ. Plaintiff then, with leave of the court, withdrew the second installment from consideration of the court and took judgment for the installment due. *Held*, that the judgment did not bar a subsequent action on the second installment.

Error to Muskegon; Davis, J., presiding. Submitted June 19, 1907. (Docket No. 89.) Decided July 1, 1907.

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Assumpsit by Robert Love against Allen J. Flitcraft for work and labor, and materials furnished. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

Cross, Lovelace & Ross, for appellant.

Nims, Hoyt, Erwin & Vanderwerp, for appellee.

BLAIR, J. Plaintiff sued defendant upon the common counts for $250, claimed to be due him for work, labor, and material furnished in building a boathouse foundation, slip, etc. Defendant pleaded the general issue, and gave notice that the work was performed under a special contract, and that the terms thereof had not been complied with; that he claimed to recoup damages, and also pleaded former recovery. Judgment was rendered for the plaintiff, by direction of the court, for the full amount of his claim.

It appeared upon the trial of this case that the plaintiff, on the 1st day of August, 1905, caused to be issued out of the circuit court for the county of Muskegon a writ of attachment against the defendant. In the affidavit for the writ plaintiff claimed that there was then due him the sum of $500. Under this writ he caused property of the defendant to be attached to the value of $2,025. Defendant gave bond in twice the amount claimed to be due, in accordance with the statute, and the property was returned to him. Plaintiff filed a declaration upon the common counts in assumpsit, to which was attached a bill of particulars in the following language:

"To the Defendant:

"The following is a bill of particulars of the plaintiff's demand, for the recovery of which this action is brought, to wit:

"For work, labor, and material furnished by the plaintiff to the defendant in constructing foundation for new boathouse, driving additional piles, moving old boathouse, and constructing steps to boathouse, $500.

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"For interest on said amount from June 30, 1905, at 5 per cent. per annum."

This bill of particulars is the same, substantially, except in amount, as the one in the case at bar. To this declaration defendant pleaded the general issue, and gave notice that the work was performed under a special contract, by which he was to pay $250 in 30 days after the completion of the work, and 60 days thereafter an additional sum of $250 in full for plaintiff's services; gave notice that the work was not performed according to contract; and claimed to recoup such damages as he had sustained by reason of such nonperformance. These notices of recoupment are substantially the same as those in the present case. Upon the trial it appeared that there was, according to the contract, only one-half of the payment due at the time of suing out the writ of attachment. Counsel for plaintiff thereupon obtained leave of the court, against defendant's objection, to withdraw from the consideration of the court and jury the second installment of $250. The jury rendered a verdict for the amount claimed, which defendant paid. Plaintiff afterwards brought this suit. Defendant claimed the right to show at this trial the breaches of the contract on the part of plaintiff, but the court refused to receive proof thereof. He also asked the court to direct a verdict in his favor, upon the ground that the former recovery was res judicata; but his motion was overruled, and a verdict directed in favor of plaintiff. To all these rulings defendant duly excepted, and on them has assigned error.

The only assignments of error discussed in appellant's brief are those raising the question of res adjudicata.

Counsel for appellant contend that this case is within the rule laid down in *Dutton* v. *Shaw*, 35 Mich. 431. We think the cases are palpably distinguishable. In *Dutton* v. *Shaw*, the plaintiff sought, by withdrawing a part of his claim which he had failed to prove, to split up an indivisible cause of action. We have uniformly held that this is not permissible. *Andreas* v. *School District*,

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138 Mich. 54. In the case before us the cause of action was divisible, and, as pleaded by defendant, the second installment was not recoverable in the first suit.

Judgment affirmed.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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O'DELL *v.* GOFF.

1. WILLS—TESTAMENTARY CAPACITY — DELUSIONS — FOUNDATION —EVIDENCE—SUFFICIENCY.

   In proceedings to probate a will, contested on the ground that testator's belief in the illegitimacy of his son was an insane delusion, evidence examined, and *held*, that there was some evidence that testator's belief in contestant's illegitimacy which influenced the making of the will was produced by spiritualistic communications.

2. SAME—EVIDENCE—ADMISSIBILITY.

   A deposition filed in a suit for divorce, brought by testator in another State against contestant's mother, in which the witness testifies to her infidelity before contestant was born, is admissible to prove that testator had good grounds to doubt the paternity of his child, there being a presumption that testator knew what the deposition contained.

3. SAME—SPIRITUALISTIC BELIEF—EFFECT.

   A belief in spiritualism, like belief in any other form of religion, affords no evidence of insanity.

4. SAME—MONOMANIA.

   A will made in consequence of a monomania, produced by testator's thinking so continually and persistently upon the subject of spiritualism as to be incapable of reasoning where

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that subject is concerned, is void for lack of testamentary capacity.[1]

5. SAME—SPIRITUALISTIC COMMUNICATIONS—EFFECT.
A will made in consequence of such extraordinary confidence in spiritualistic communications that testator was impelled to follow them blindly and implicitly is not testator's will, and is not admissible to probate, and it is immaterial whether this conclusion rests upon the ground of absence of testamentary capacity or upon the ground of undue influence.

6. SAME—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.
In proceedings to probate a will, evidence examined, and *held*, that there was evidence that testator was a monomaniac upon the subject of spiritualism, that in making his will he was influenced by spiritualistic communications which he was incapable of resisting, and that there was therefore evidence of undue influence.

7. SAME—SPIRITUALISTIC FAITH—EVIDENCE.
In proceedings to probate a will, contested on the ground of incapacity and undue influence induced by monomania on the subject of spiritualism, the truth or falsity of the spiritualistic faith is not in issue, and witnesses should not be permitted to testify that testator was a monomaniac merely because he believed in spiritualism.

8. SAME—INSANITY—EVIDENCE—ADMISSIBILITY.
Refusal to permit proponents to prove by one who was duly qualified that there was nothing irrational from the standpoint of a spiritualist in testator's belief that a medium in a trance might do him harm was error, since such testimony would tend to remove from the minds of the jury the impression which might otherwise exist that the particular belief was evidence of insanity.

9. SAME—WITNESSES—CROSS-EXAMINATION—RELIGIOUS BELIEFS.
A witness for contestant, who had testified to lack of testamentary capacity, could not be cross-examined upon the subject of other religions and their effect on testamentary capacity.

10. SAME—DISCRETIONARY RULINGS.
It was discretionary with the court to refuse to compel one of contestant's witnesses to state upon cross-examination which of several circumstances indicating insanity was, in his judgment, the most significant.

[1] As to belief in spiritualism, witchcraft, etc., as affecting capacity to make will or deed, see note to *Lewis* v. *Arbuckle* (Iowa), 16 L. R. A. 677.

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11. SAME — PATERNITY — EVIDENCE — PERSONAL RESEMBLANCE — HARMLESS ERROR.
Whether evidence of contestant's resemblance of testator was competent will not be decided upon a record that conclusively establishes paternity in testator, that being the only issue to which the testimony was applicable.

12. SAME—DECLARATIONS OF TESTATOR — ADMISSIBILITY.
Declarations of testator tending to prove lack of testamentary capacity made after the making of the will are admissible.

13. COSTS—APPEAL—PROLIX BRIEF.
Where an excessively prolix brief is filed by appellant, costs on reversal will include only so much thereof as would have been sufficient to amply present his case.

Error to Cass; Coolidge, J., presiding. Submitted April 13, 1906. (Docket No. 6.) Decided July 13, 1907.

B. O'Dell and others presented for probate the last will and testament of John F. Goff, deceased. The will was allowed in the probate court, and Leslie Goff appealed to the circuit court. There was judgment for contestant, and proponents bring error. Reversed.

A. Lynn Free (*M. L. Howell*, of counsel), for appellants.

Lyle & Eby and *Harsen D. Smith* (*Victor M. Gore*, of counsel), for appellee.

CARPENTER, J. This suit is brought to secure the probate of the will of John F. Goff, deceased. The proponents are the executors named in said will. The contestant is the son of the testator. The will in question was made November 3, 1885, when the testator was 66 years old. It has a codicil made September 23, 1897, at which time the testator was 78 years of age. Testator died in 1904, when he was 85 years of age. The will and codicil disposes of testator's entire estate, aggregating in value $41,000. The residue — constituting the bulk of the estate — is bequeathed "to be used as a nucleus in

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founding, building and equipping a home for poor and aged mediums." Only $1,800 is given to contestant, who is described as testator's "reputed son." It should also be stated—and this is an important circumstance—that spiritualistic mediums whom the testator had been in the habit of consulting, and through whom he received spiritualistic communications, received small legacies. Testator was married August 6, 1854, to contestant's mother. In May, 1855, he commenced suit for divorce in the circuit court for the county of Cass, in chancery, charging her with adultery. This suit was dismissed by stipulation, and the parties resumed their marital relations. Contestant, the son, was born in September, 1855. August 5, 1856, testator again commenced suit for divorce. This time he filed his bill in the circuit court for Elkhart county, Ind., and a decree of divorce was granted on the ground of desertion on the 17th of October, 1856.

After the granting of said last-mentioned divorce—which I think it may be assumed was invalid—Mrs. Goff and contestant, her son, went to California to live. There she remarried, and died in 1870. The testator has always believed and insisted that his wife was guilty of adultery, and that contestant was not his son.

He was a man of more than usual business ability. When the Indiana divorce was granted, he was worth only $3,000 or $4,000, and when he died, as already mentioned, he had accumulated an estate of $41,000.

When the will was made, and for many years prior thereto, and from that time until he died, he was a firm believer in the doctrine of spiritualism. He believed that the spirits of the departed communicated with him, not only through mediums, but directly. He believed that he talked with the apostles. He believed in the materialization of spirits and other spiritualistic phenomena, and one witness testified that he said his will was dictated by spirits. The trial court charged the jury that they might render a verdict finding that the instrument in question was not the last will and testament of John Goff, upon either of the following three grounds:

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First. That John Goff was "at the time of making the will laboring under an insane delusion in regard to the paternity of his child, which governed or controlled him in the execution of his will. In the same connection is also involved the question whether he was laboring under an insane delusion that his wife had been guilty of adultery."

Second. That the will was "the result of undue influence over the mind of John Goff, manifested by the belief that communication from deceased persons had advised him how to make his will by adopting such communications as his guide in making the will and to the exclusion of his own free will and choice."

Third. That John Goff was "a monomaniac upon the subject of spiritualism to such an extent and intensity as to produce that mental derangement which rendered him incapable of comprehending and appreciating the natural objects of his bounty."

The jury rendered a verdict in contestant's favor. We are asked to reverse the judgment entered upon said verdict on various grounds, which, so far as needful, we will discuss.

First. Insane delusion: Was the belief of testator that he was not the father of contestant an insane delusion? It was certainly a delusion; for on this record we are bound to say that contestant was testator's son. (This subject will again be noticed in this opinion.) Was this delusion an insane delusion? That was a question submitted to the jury. Proponents contend that there was no evidence to warrant the submission of this question, because, they say, "there is no evidence that tends to show" that this delusion was produced by testator's belief "in spiritualism or in spirit communications." We content ourselves with saying there is such testimony. Proponents insist—and in this they may be right—that testator believed in his wife's adultery and contestant's illegitimacy before he became a spiritualist. But there is testimony indicating that he would not have continued to

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believe in said illegitimacy as he did when the will was made had he not received and given implicit credit to spiritualistic communications informing him that contestant was not his son. In short, there is evidence that testator's belief in contestant's illegitimacy which influenced the making of the will was produced by spiritualistic communications.

In this connection, we discuss certain objections to the admission and exclusion of testimony relating to this delusion. There was found in the files in the divorce proceedings of the Indiana court a deposition of William P. Bennett (an old and deceased resident of Cass county), wherein he testified that testator's wife, Rowena Goff, admitted in his presence that she committed adultery with several men at different times and places while she was living with testator and many months before the boy—contestant—was born. This deposition was admissible, not to prove the facts testified to by the witness, but to prove that testator had good grounds to duobt the paternity of his child. The trial court held it not admissible for this purpose, because there was no evidence that testator had ever seen the deposition. In so deciding the court proceeded upon the assumption that the jury could not infer that the testator, the complainant in the suit, was informed of the testimony which he introduced to establish it. This assumption was erroneous. It is to be presumed that he knew of it. While I have found no case in which this principle is announced, it is recognized in the following: *Richards* v. *Morgan*, 4 Best & S. 641; *Blanchard* v. *Hodgkins*, 62 Me. 119. Other objections to rulings excluding and admitting testimony upon the subject of insane delusion are made. They are not well taken and require no discussion.

Second. Did testator's belief in spiritualism destroy his testamentary capacity? His belief in spiritualism was not evidence of insanity. *Bonard's Will*, 16 Abb. N. Y. Prac. (N. S.) 128; Rood on Wills, § 129; *In re Spencer*, 96 Cal. 448; *Will of J. B. Smith*, 52 Wis. 543;

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Buchanan v. *Pierie*, 205 Pa. 123. One accepts his religious faith on evidence that is satisfactory to his mind. A court of law will never inquire whether that faith is sound or unsound. It does not possess the machinery for executing such an undertaking. It will content itself with saying—and that is sufficient for the purposes of this case—that one's religious faith affords no evidence of insanity.

It does not follow, however, that one may not have such a faith in spiritualism as to destroy his testamentary capacity. He may think so continually and persistently upon this subject as upon many other subjects as to become a monomaniac, incapable of reasoning, where this subject is concerned. In that case it should be said that a will made in consequence of such monomania is void for lack of testamentary capacity. *Orchardson* v. *Cofield*, 171 Ill. 14 (40 L. R. A. 256). So, too, a believer in spiritualism may have such extraordinary confidence in spiritualistic communications—whether those communications reach him through mediums or are received by him as he believes directly—that he is impelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of testator, and is therefore not admissible to probate. We need not speculate as to the ground upon which this conclusion rests. It is utterly unimportant whether it rests upon the ground of absence of testamentary capacity, or, as held by the trial court, upon the ground of undue influence. See, also, *Robinson* v. *Adams*, 62 Me. 369. It is sufficient to say that a will brought about by an influence which the testator could not resist is not his will.

Tested by the foregoing principles, which were recognized by the trial court, it cannot be said that there was no evidence upon which these issues should have been submitted to the jury. Indeed, we do not understand that it is claimed that there was no evidence tending to prove

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that testator was a monomaniac on the subject of spiritualism. There certainly was such testimony. There was testimony tending to prove that testator's faith in spiritualism had led him to many strange conclusions; for instance, that on one occasion a spirit brought him a crisp new $5 bill, and that on another occasion a spirit—designated by him as an evil spirit—tried to take his life with a butcher knife when he was lying in bed. There is evidence, too, that his mind dwelt upon the subject of spiritualism so persistently and profoundly as to make him incapable of reasoning when that subject was concerned. In short, there was evidence tending to prove that he was a monomaniac upon the subject of spiritualism. It is claimed, however, that there was no testimony tending to prove that the will was procured by undue influence. Undue influence as here used means that spiritualistic communications overcame the testator's mind, and compelled him to make the will in question. There certainly was testimony tending to prove that in making the will testator was influenced by spiritualistic communications. And it is a significant circumstance (see *Matter of Beach*, 23 App. Div. [N. Y.] 411), already alluded to, that many of these communications came through mediums who are both directly and indirectly beneficiaries in the will. From testator's actions and declarations the inference might be drawn that he was incapable of resisting the influence of these communications. There was therefore evidence of undue influence.

In this connection we consider objections to rulings admitting and excluding testimony upon the subject of testamentary capacity. As the truth or falsity of the spiritualistic faith was not at issue in this suit, it was proper for the trial judge to exclude testimony tending to prove it true—herein is included testimony showing the foundation upon which spiritualism rests—and it was improper for him to admit, as he did, testimony tending to prove it untrue. For the same reason, it was improper for contestant's counsel to suggest during the taking of the testi-

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mony and to argue at the conclusion of the testimony that spiritualism was untrue. According to the foregoing rule, witnesses should not have been permitted to testify that testator was a monomaniac merely because he believed in spiritualism. Generally speaking, this rule was regarded. I think, however, in the case of contestant's witness George Longsduff this rule was disregarded. The witness himself testified on cross-examination:

"My definition of a 'monomaniac' [and he had testified that testator was a monomaniac] would include any spiritualist who believed that they could receive communications from the departed."

The court refused to permit proponents to prove by one who was duly qualified to give such testimony that there was nothing "irrational from the standpoint of a spiritualist in the belief of John Goff [and he had such a belief] that a medium in a trance might do him harm." This was error. The excluded testimony would tend to remove from the mind of the jury the impression which might otherwise exist that the particular belief above referred to was evidence of insanity.

We have examined the other complaints respecting the rulings admitting and excluding testimony upon the question of testamentary capacity. None of these rulings were prejudicial. Most of them were clearly correct. As an instance of such rulings, we mention the refusal of the court to permit proponents' counsel to cross-examine certain witnesses of contestant, who had testified to lack of testamentary capacity, upon the subject of other religions and their effect on testamentary capacity. This ruling was correct. See *In re Hogmire's Appeal*, 108 Mich. 410. Other rulings related to questions within the discretion of the trial court. As an instance of these latter rulings, we mention the refusal of the court to compel one of contestant's witnesses upon cross-examination to state which of several circumstances indicating insanity was, in his judgment, the most significant.

Third. Testimony that contestant resembled testator:

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Contestant was permitted to prove by various witnesses that he resembled testator. The purpose of this testimony was to prove that testator was contestant's father. Proponents contend that this testimony was incompetent. This is a question which, upon this record, we are not called upon to determine; for the testimony was not prejudicial. It could be prejudicial only upon the assumption that the jury used it as evidence that contestant was testator's son. Their use of the testimony for that purpose would not injure proponents, because upon this record the fact that contestant was testator's son was conclusively established. Contestant was born in lawful wedlock, and there is no evidence whatever that his mother committed adultery (though there is evidence that testator entertained that belief). It will be perceived that, according to our ruling, it was quite unnecessary for the contestant to introduce the testimony under consideration, and the trial court might properly have excluded it, and he may properly exclude it upon a second trial if the record is like the one before us, because it relates to an issue which the jury will not be called upon to determine.

Fourth. Declarations of testator after the making of the will: Complaint is made because the trial court permitted contestant to prove various declarations of testator tending to prove lack of testamentary capacity made after the making of the will. This testimony was properly admitted under the rule recognized in *Spencer* v. *Terry's Estate*, 133 Mich. 39.

Proponents' brief is a printed volume containing 269 pages. In taxing costs contestant will be required to pay only for a brief of 80 pages. Such a brief would have been ample and more serviceable.

Judgment reversed, and new trial ordered, with costs.

McALVAY, C. J., and GRANT, BLAIR, and MOORE, JJ., concurred.

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COX *v.* KLEIN.[1]

1. ASSAULT AND BATTERY—CIVIL LIABILITY—ACTION—EVIDENCE.
   In an action for an assault and battery, committed while defendants were attempting to retake cattle which had been impounded by plaintiff's husband, defendants were not entitled to show facts from which it could be inferred that the cattle were let into the husband's enclosure, and were therefore not trespassing when impounded, unless such facts were connected with the husband.

2. SAME—INSTRUCTIONS—SUFFICIENCY.
   An instruction that plaintiff could not recover unless the cattle were trespassing in the husband's field at the time they were impounded, and were not put there by the husband, was sufficiently favorable to defendant.

3. SAME—APPEAL—ASSIGNMENTS OF ERROR—NECESSITY.
   Whether the court erred in calling the attention of the jury to the statute that allows the plaintiff in assault and battery no more costs than damages will not be considered where no error is assigned upon the instruction.

4. APPEAL AND ERROR — QUESTIONS CONSIDERED—COSTS—RETAXATION.
   Questions arising on the retaxation of the costs before the circuit judge are no part of the record brought to this court on writ of error to review the judgment, and cannot be considered on such review.

Error to Oakland; Smith, J. Submitted April 20, 1906. (Docket No. 118.) Decided July 13, 1907.

Trespass vi et armis by Gertrude Cox against Frederick J. Klein and Thomas Foley. There was judgment for plaintiff, and defendants bring error. Affirmed.

Patterson & Patterson (*Samuel T. Douglas*, of counsel), for appellants.

Fred M. Bond and *John M. Feier*, for appellee.

[1] Rehearing denied October 4, 1907.

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McALVAY, C. J. Plaintiff recovered against defendants for damages for injuries claimed to have been received by her on account of an alleged assault and battery by the defendants. The parties to this controversy own farms in Oakland county. The Cox place adjoins that of defendant Klein on the west, with a highway running north and south between them. Defendant Foley is the foreman on Klein's farm. Some of Klein's cattle had been shut up by Cox in a yard back of his barnyard, under the claim that they had broken into his oat field. Defendant Klein claimed that the cattle had been let out of his pasture and impounded by Cox, in pursuance of a threat to do so to get even with him, and to force the collection of a disputed claim of $2. Defendants and three hired men of Klein came to get the cattle, and a dispute ensued in regard to the matter, in which Cox, who had a gun, threatened to shoot; and during the dispute, and while defendants were attempting to open a gate to the yard, plaintiff claims she was injured by defendants. She claims that she was holding the gate to prevent its being opened, having one arm around the gate post and the other through the gate, in which position her arm was injured by defendants in swaying the gate, and that she had then let go the post and grasped the gate about the middle to hold it, and defendant Foley scratched her fingers in attempting to break her hold, and that the gate was pushed or fell over on her. The dispute about the cattle was settled and paid by Klein, but for some reason broke out again when they were taking the cattle into the highway. Cox threw a stone, hitting one of the men in the back, and blows were exchanged before the men separated. These are the circumstances, briefly stated, which occurred on the occasion of the claimed injury. Plaintiff was present, and an active participant with her husband in attempting to restrain the cattle. The case was tried twice in the circuit court. Upon the second trial plaintiff recovered a judgment. It will not be necessary to consider all of the numerous assignments of

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error upon which defendants claim the case should be reversed.

Defendants contend that the trial court erred in excluding testimony offered in support of their defense that plaintiff's husband opened or procured the opening of Klein's fences, and wrongfully took his cattle. The ruling of which complaint is made came about in this way. A hired man, a witness for defendants, was on the stand. He was asked by counsel for defendants:

"*Q.* Did you look to see if any of Klein's fences were down?

"*A.* He told me to see if he had something broken or not. I go see, and find nothing broken, and all the gates closed.

"*Mr. Bond:* I object to all this class of testimony as incompetent and immaterial.

"*Mr. Patterson:* I think it is material for this reason: We have the threats of this man.

"*The Court:* On your theory of the case or your claim based on the testimony that you expect to introduce, that Mr. Cox actually took the cattle out of Klein's field and put them into his oats for the purpose of this suit?

"*Mr. Patterson:* That is our theory.

"*The Court:* Does Klein expect to testify to anything of that sort?

"*Mr. Patterson:* He expects to testify to enough facts to warrant this jury in concluding that this is true.

"*The Court:* That he actually let Klein's fences down?

"*Mr. Patterson:* Let the fences down or somebody opened the gate, but we have no direct proof that Cox opened the gate and took the cattle out, but we have some evidence upon which the jury could conclude somebody did.

"*The Court:* Unless you can connect Mr. Cox with it, I think I ought to exclude the testimony. Exception for defendant.

"*Q.* Did you look at these fences and gates in that pasture while the cattle were still up to Mr. Cox's?

"*A.* Yes, sir.

"*Q.* Did Cox tell you where Klein's cattle got into the field?

"*A.* He told me so.

"*Q.* Where did he tell you they got into his field?

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"*A.* Right on the corner of Mr. Cox's field. He said the cattle had got in there.

"*Q.* Did you look at the corner where Mr. Cox said the cattle got into his field to see if you could find any tracks?

"*A.* Yes, sir. I could not find any tracks.

"*Q.* How soon after you got the cattle back from Cox's did you look to see if you could see the tracks?

"*A.* On the same day, same time.

"*Q.* What is the fact as to whether there would have been tracks if the cattle had got in there where Cox said they did?

"*A.* This place there is a little wet because there is a hole there. It is always wet, and, if the cattle had gone in there, they would have left tracks."

It will be perceived that the question asked the witness had been answered. It does not appear that any testimony offered was excluded. The suggestion concerning what it was expected to prove was met by a proper reply.

Counsel for defendants asked the court to charge the jury as follows:

"If you find from all the evidence and circumstances of the case that Cox impounded Klein's cattle because and in pursuance of a threat to do so made to Klein the same day, for the purpose of collecting an account he claimed to have against Klein, and not because of any trespass by the cattle or damage done by them, then Mr. Cox had no right to hold the cattle when Mr. Klein demanded them."

It was given with the following addition and explanation:

"I give that upon the understanding or theory that Cox shut the cattle up himself—i. e., if they never went into the oat field themselves, but that Cox because of his threat for the purpose of collecting a debt shut the cattle up himself—then, of course, he would not have any right to hold them, and Mr. Klein could take them. But if Mr. Patterson, defendants' counsel, means by that, that even if the cattle went into the oats themselves so that they were trespassers, cattle running at large and went there themselves, then Mrs. Cox cannot recover because Mr. Klein [Cox?] had a hatred or ill feeling growing out of the controversy that arose in the morning, I do not

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agree with him. The request means this: If Cox through hatred or ill feeling growing out of the trouble in the morning shut the cattle up himself, took them from the road himself, then he could not hold them in that way. If the cattle were in the road, he could not shut them up merely on that account, but he did have a right to impound them, provided they went into the oat field themselves, or if he got the cattle out of Klein's field, although there is no evidence to warrant that, or if they were running in the road and came along in front of the premises, and he shut them up on account of that threat to make Klein trouble, he must take his chances of Klein rescuing them by force as far as this case is concerned, although it might have been better to have replevined them. For the purposes of this case, I charge you that Mr. Cox could not prevent Klein going there and taking them by force."

It is claimed that the court erred in giving this request with the above additions and explanations. In other portions of his charge the court said to the jury that plaintiff could not recover unless the cattle were trespassing in the oat field, and were not put there by Cox. This was sufficiently favorable to defendants.

As to other errors assigned upon the rulings of the court upon admission of evidence, we do not consider them of sufficient importance for extended notice. Testimony was allowed which was immaterial to the issue, but was of minor importance, and, standing alone, not sufficiently prejudicial to warrant reversal.

In the brief for defendant Klein it is urged that the court erred in calling the attention of the jury to the statute which provides that, in actions for damages for assault and battery, the plaintiff can recover no more costs than damages. This portion of the charge occupies more than a page of the printed record. As there is no error assigned upon this, the question is not before us for decision.

Defendants assign error upon the questions of retaxation of costs by the circuit judge. Such questions cannot be considered or raised in this manner. They are no proper part of the record brought to this court on writ of

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error to review a judgment. *Moore* v. *Daiber*, 92 Mich. 402.

It is unnecessary to consider other errors assigned.

The judgment is affirmed.

CARPENTER, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

PIERSON v. ILLINOIS CENTRAL RAILROAD CO.

1. EVIDENCE—ADMISSIBILITY—CONCLUSION OF WITNESS.
   In an action against a carrier for wrongful ejection of plaintiff from defendant's passenger train, a statement by plaintiff, after testifying that as he was sitting in his seat he was seized by the conductor, who proceeded to drag him out, "I was in no position to meet any such assault, for that reason I resisted as long as I could," is not objectionable as a conclusion.

2. TRIAL—RECEPTION OF EVIDENCE—STRIKING OUT—PREJUDICE—NECESSITY OF REQUESTS FOR INSTRUCTIONS.
   The receipt, over objection and exception, of immaterial evidence, which is stricken out as soon as its immateriality develops, is not erroneous where no request is made for an instruction upon the matter.

3. EVIDENCE—EXPERTS—EXCLUSION—HARMLESS ERROR.
   The exclusion of proper questions propounded to an expert witness is not prejudicial where the inquiry is pursued in another form of questions and the information secured.

4. SAVING QUESTIONS FOR REVIEW — ARGUMENTS OF COUNSEL — NECESSITY OF OBJECTION AND RULING.
   Assignments of error based upon the argument of counsel will not be reviewed where the record does not show that objection was made at the time and ruled upon by the court.

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5. CARRIERS—PASSENGERS—EJECTION—DAMAGES.

Where a passenger, presenting a ticket requiring him to identify himself as the purchaser upon request, and providing that any claim for damages in consequence of a bona fide mistake of a conductor in rejecting proofs of identity shall be limited to the price paid for the ticket, is wrongfully ejected by a conductor not acting in good faith, he is entitled to substantial damages, and is not limited in his recovery to the price paid for the ticket.

6. SAME—INSTRUCTIONS—ISSUES.

In an action against a carrier for wrongful ejection of a passenger presenting a ticket requiring him to identify himself as its purchaser on request, it appeared that plaintiff's physical description in the ticket was incorrect, but the declaration did not count on the misdescription, the action being based upon an unreasonable enforcement of the reasonable regulation requiring identification. *Held*, that instructions that, "If there was any mistake in the description of plaintiff on the ticket, it was a mistake for which defendant was liable," and "Defendant cannot limit its liability for the negligence of itself or its agents by any contract contained in the ticket purchased by plaintiff, upon which he was seeking transportation," condemned defendant for negligence not declared upon and furnished ground for a verdict against it whether the regulation was reasonably enforced or not, and were prejudicial. MCALVAY, C. J., and MOORE, J., dissenting.

Error to Calhoun; Hopkins, J. Submitted June 6, 1906. (Docket No. 20.) Decided July 13, 1907.

Case by John A. Pierson against the Illinois Central Railroad Company for a wrongful ejection from defendant's train. There was judgment for plaintiff, and defendant brings error. Reversed.

Williams & Beck, for appellant.

Hatch & Anderson, for appellee.

MCALVAY, C. J. Plaintiff recovered a judgment in an action of trespass on the case against defendant, for damages resulting from being forcibly ejected, by the conductor, from a train of defendant upon which plaintiff was

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riding as a passenger, between Omaha and Chicago, near Council Bluffs, Iowa. Suit was begun by attachment in the circuit court for Calhoun county, and jurisdiction obtained by the seizure of certain cars of defendant, a foreign corporation.

Plaintiff, on December 12, 1903, purchased and paid for a ticket at Seattle, Wash., at the office of the Oregon Railroad & Navigation Company, from Seattle to Chicago and return, and at the time of purchase signed his name upon the ticket. On the same day he began his journey and traveled on said ticket until he reached Omaha, on December 22d. At the last-named place he took the train of defendant company for Chicago. Before reaching Council Bluffs the conductor on defendant's train took plaintiff's ticket, punched two holes in it, and returned it to him. Either then, or soon after, when the conductor returned, plaintiff's identity with the description on the ticket was questioned by him and fare was demanded. There was a sharp dispute between these two persons as to this fact and as to what actually occurred; plaintiff claiming that he was the person who bought the ticket, and that he offered to identify himself, and the conductor claiming that he refused to identify himself, or to pay his fare. Plaintiff was ejected from the train, and during the altercation he struck the conductor a blow with his fist on the forehead. When on the depot platform after he was put off, some conversation occurred between plaintiff, the conductor, and the trainmaster, who was present. Plaintiff then re-entered the car and paid the fare, taking the conductor's receipt therefor. Plaintiff was about 60 years old, and engaged in the business of establishing agencies for burglar alarm clocks. He traveled on the average 18,000 to 20,000 miles a year, and had crossed the continent 12 times on round-trip tickets. The ticket in question was retained by him and produced in evidence. It was a tourist's excursion ticket good for one first-class passage, having printed on it a contract in 13 paragraphs, and numerous coupons, and also dates of years and

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months and description of passenger. It is printed in the record, covering seven pages. It is not questioned but that plaintiff was the actual purchaser of this ticket and its lawful owner. The question raised by the conductor was relative to the description of the passenger as punched on the ticket. The punch marks, except those made by different conductors during the journey, were made as usual by the agent who sold the ticket, at the time of the sale. Among other stipulations printed on the ticket was the following:

"10. The holder hereby agrees to establish identity as the original purchaser by signature or otherwise, whenever requested to do so by any conductor or agent of the line or lines over which this ticket reads, and on failure to do so this ticket shall become thereafter void and may be taken up and full fare collected."

The jury returned a general verdict for plaintiff, and also found specially on questions submitted by defendant as follows:

1. Did the plaintiff refuse to offer proofs of identity to the conductor, N. A. Ross, previous to the ejection of said plaintiff from the car in question? No.
2. Did N. A. Ross, the conductor, give the plaintiff an opportunity to identify himself, pay his fare, or leave the car before he removed him? Yes.
3. Did the conductor, N. A. Ross, act in good faith in his dealing with the plaintiff? No.

Defendant made a motion for a new trial. On June 26, 1905, said motion was denied and an opinion filed by the court, giving his reasons therefor. On October 14, 1905, defendant filed exceptions to the ruling and decision of the court in denying such motion. Defendant asks this court to reverse the judgment entered upon the verdict of the jury on account of errors claimed to have been committed upon said trial.

As already appears, the principal question in dispute between these parties upon the trial was whether the conductor of the defendant company was justified in ejecting plaintiff from the car. Incidental to this was the

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question of the amount of force used by him upon the plaintiff, and, if defendant's agent, the conductor, wrongfully ejected plaintiff, the extent of plaintiff's injuries, if any, and the amount of damages he was entitled to recover. Upon all of these propositions under the charge of the court, the jury found in favor of the plaintiff, and there was evidence in the case, which, if believed by the jury, warranted the verdict rendered.

The errors assigned will be considered in groups:

(1) Errors upon the admission and exclusion of evidence.
(2) Errors based upon improper arguments of counsel.
(3) Errors upon refusal to give requests to charge.
(4) Errors committed in the charge of the court.
(5) Errors upon the decision of the court in denying a motion for a new trial.

1. In relating what occurred at the time he was ejected from the car, plaintiff, among other things, testified that he was sitting in his seat, and was seized by the conductor, who proceeded to drag him out. He then said:

"I was in no position to meet any such assault, for that reason I resisted as long as I could."

Error is assigned because the court refused to strike this out as a conclusion of the witness. We do not so understand it. The witness gave his position as his reason for resisting in the manner he did.

Some testimony was offered under objection and exception as to what occurred when the train afterwards arrived at Ft. Dodge and conductors were changed. It was received, but stricken out as soon as its immateriality developed. Such action is held not to be erroneous; no request having been offered asking the court to instruct the jury upon the matter. *Barnett* v. *Insurance Co.*, 115 Mich. 247.

Defendant excepted to the exclusion of certain questions propounded to an expert witness. This was not prejudicial, for the reason that the inquiry was pursued in

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another form of question, and the information secured. *Lamb* v. *Lippincott*, 115 Mich. 611.

Errors are assigned upon the admission of testimony of an expert witness relative to a general custom of railroads in punching tickets, for the reason that he did not include defendant company; also, for excluding testimony offered in surrebuttal to show the absence of such custom on defendant's road. Defendant's witness, Conductor Ross, admitted that this was the manner of punching tickets on its road. The whole matter was entirely immaterial to the issue. There was no dispute as to how the conductor punched this ticket, nor the effect of such punching, if the question of identification had not been raised.

2. The arguments of counsel claimed to have been improper and prejudicial do not appear in the record. Exceptions do appear taken after the arguments were closed, stating wherein they were improper. Plaintiff denies that the statements claimed were made. The record does not show that objection was made at the time and ruled upon by the court. Therefore this court cannot review it. *Miller* v. *Lachman*, 117 Mich. 68, and cases cited.

3. Twenty-four of defendant's requests to charge were refused, and error is assigned upon each refusal. To give these requests at length and discuss them would be of no benefit to the profession, and is not necessary. An examination of the entire charge of the court shows that the substance of these requests, proper to give the jury, was given.

4. The charge of the court to the jury was given with great care, and for the most part appears to have been entirely satisfactory to the defendant. The court correctly stated what was involved in the case, giving clearly and fully the claims of the respective parties. The rights and duties of the plaintiff and the defendant's conductor were fully and repeatedly set forth and defined. Among other things, he said:

"It was the duty of the plaintiff, upon demand so to do, by the conductor in charge of the train, to either iden-

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tify himself to the reasonable satisfaction of the conductor, or pay his fare, or leave the train. * * *

"The act of the conductor of the defendant company in removing the plaintiff from the car was the act of the defendant company, and rendered it liable to the plaintiff for all his damages, providing such ejectment was unlawful, or, if lawful, made with unnecessary force and violence.

"I instruct you that it was not within the province or authority of the conductor, Mr. Ross, to in any manner change or vary the terms of the ticket presented by plaintiff. Under the terms of that ticket, all that the conductor could do was to pass upon the question of the proper identification of the plaintiff, and if the conductor was reasonably satisfied of the identification of the plaintiff—that is, that he was the same person described in the ticket—then the conductor should have accepted the ticket and allowed plaintiff transportation on that train; but, if you find that, not being reasonably satisfied as to the identification, the conductor asked for the identification, and plaintiff refused to identify himself, then the conductor had no right to accept such ticket or allow transportation on the ticket. * * *

"I instruct you that, as between the conductor and plaintiff, the right of the latter to travel or be transported by this train was governed entirely by the terms of the ticket, and if you find that the conductor reasonably believed, and had good reason to believe, that such a discrepancy existed, then it was proper for him to ask plaintiff to identify himself, and if you find that he did ask plaintiff to identify himself, and plaintiff refused so to do, then it was proper for the conductor to demand that plaintiff pay his fare in cash or leave the train; and, if you find that the plaintiff in turn refused to do either of these things, then it was proper and lawful for the conductor to use such reasonable force as was necessary to put plaintiff off the train; and, if you find that the conductor used only such reasonable force as was necessary, then your verdict must be for the defendant, no cause of action. If you find under the circumstances stated that the conductor used more force than was reasonably necessary, then the plaintiff can only recover for the damages resulting to him, if any, from such excess of force. * * *

"In determining the question as to whether or not the conductor was justified in ejecting the plaintiff from his

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train, you should take into account all the evidence in the case bearing upon what occurred at the time the plaintiff first presented his ticket, and what afterward occurred when the conductor returned to the plaintiff while he was still in the train. * * *

"The provision printed upon the face of the ticket that the passenger shall, whenever requested by the conductor to do so, identify himself by writing his name or otherwise, is a reasonable regulation, and it would be the duty of Mr. Pierson to comply with a request of the conductor to identify himself, by writing his name, or otherwise, at any time, even though the conductor had accepted and punched his ticket and returned the ticket to the plaintiff, thereby intending to signify his acceptance of the ticket, and thereby canceling the ticket to the end of his run at Ft. Dodge, Iowa. Did the conductor request Mr. Pierson to identify himself by writing or otherwise? And did Mr. Pierson refuse to write his name, or to otherwise identify himself? If you find that he did refuse, after being requested so to do, to identify himself, then the conductor would be justified in ejecting him from the train, using, however, no more force than was necessary to accomplish that object. This, gentlemen, is a question of fact to be determined by you under all the evidence in this case, and is really the question upon which the decision of this controversy turns."

From these portions of the charge it clearly appears that the court, upon the crucial question in the case, correctly stated the law to the jury.

Defendants assign error upon part of the charge which is as follows:

"If you shall find as a fact, from the evidence in the case, that plaintiff purchased the ticket on which he was riding when ejected from the cars of defendant company, * * * or of one who had their tickets, and with apparent authority to sell the same, and paid the fare demanded, and in purchasing the ticket used no fraud, but acted in good faith, then I charge you that, if there was any mistake made in the description of plaintiff on the ticket, it was a mistake for which defendant was liable, and your verdict must be for plaintiff."

It is a well-settled rule that a small part of a charge cannot be isolated, and, standing alone, made the ground

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for reversible error, if upon the entire charge it can fairly be said that the jury were not misled. The sentence objected to might well have been omitted. It was not a necessary part of the charge, and was probably induced by a request of defendant based upon a claimed theory of plaintiff relative to a mistaken description in the ticket. Plaintiff did not claim that any mistake had been made in the description contained in the ticket. The case was submitted to the jury upon the theory that plaintiff's rights depended upon the ticket he presented, and that the conductor was within his rights if he demanded identification; the dispute being as to what occurred as to identification. Defendant could not have been prejudiced or the jury misled, because the court later clearly and correctly stated the law.

Defendant also claims that the court erred in charging:

"Defendant company, being a common carrier of passengers for hire, cannot limit its liability for the negligence of itself or its agents by any contract contained in the ticket purchased by plaintiff on which ticket he was seeking transportation."

This is not claimed to be incorrect as an abstract proposition of law, but that it had no application to the case. What has just been said relative to construing the charge as a whole applies here. The paragraph first quoted in this opinion immediately follows the sentence objected to:

"It was the duty of the plaintiff, upon demand so to do by the conductor in charge of the train, to either identify himself to the reasonable satisfaction of the conductor, or pay his fare, or leave the train."

Neither party questioned what the contract between them was. The court in his charge distinctly and correctly told the jury what they must find in order to hold defendant liable. The error was not prejudicial.

It is also objected that the court did not properly instruct the jury as to the rule of damages governing the case under the ticket contract. This question is raised by exceptions to certain portions of the charge and the re-

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fusal to give certain requests. This objection is based upon the eleventh paragraph of the said contract:

"It is hereby agreed and understood that any claim for damages by the purchaser hereof arising out or in consequence of any bona fide mistake of any conductor or agent in rejecting such proofs of identity or in forfeiting this ticket or refusing further passage thereon shall be limited to the amount which such purchaser shall have originally paid for this ticket."

It is contended that this case is within the decision of this court in the case of *Brown* v. *Railway Co.*, 130 Mich. 483, and controlled by it. This case can be distinguished from the *Brown Case* in this: In the case at bar, plaintiff presented a ticket entitling him to transportation, if he was the person who purchased it. It was a ticket good on its face for the distance to be traveled. The only question open was that of identification. The jury found specially that plaintiff did not refuse to identify himself, and that the conductor did not act in good faith in his dealing with him. This court has held that a passenger presenting a ticket good on its face for the distance to be traveled is entitled to ride, and if wrongfully ejected may recover substantial damages. *Zagelmeyer* v. *Railroad Co.*, 102 Mich. 214; *Vining* v. *Railway*, 122 Mich. 248; *Carvey* v. *Railway Co.*, 133 Mich. 659. See, also, *Hufford* v. *Railroad Co.*, 64 Mich. 631. The court was not in error in refusing to limit the amount of the recovery to the amount paid for the ticket. Other errors assigned upon the charge are either similar to those just discussed, or, from a reading of those portions of the charge objected to, appear to be without merit.

5. The specific errors assigned upon exceptions to the decision of the court in denying the motion for a new trial are expressly waived in appellant's brief. These include all the exceptions relative to the special findings of the jury, and are not discussed. The only exception to said decision not expressly waived, and upon which error is assigned, is in the following words:

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"Said defendant also excepts to the judgment and decision of the court in overruling said motion for a new trial."

Of this assignment of error appellant says:

"Any discussion of the same would be a reiteration of our argument in support of the previous assignments herein considered."

In the absence of discussion, and neglect to call the attention of this court to any specific error committed by the trial court in said decision, and by indicating a reliance upon the discussion of errors committed on the trial, appellant must be held to have waived all errors assigned upon said decision denying the motion for a new trial.

We find no reversible error in the case.

The judgment of the circuit court should be affirmed.

MOORE, J., concurred with MCALVAY, C. J.

HOOKER, J. This controversy involves disputed questions of fact as to the circumstances under which plaintiff was ejected from defendant's car and the amount of damage. A claim was made that the conductor acted in bad faith, and the jury so found. Hence it was proper for them to award damages for injured feelings.

The matter of bad faith was a question of fact, and any testimony bearing upon it should not have been excluded. The plaintiff offered testimony to the effect that when the ticket was taken the conductor punched it, and that, according to the custom of railroads in general, this was an acceptance of the ticket, and claimed that he could not lawfully raise the question of plaintiff's identity afterwards. If this was the custom of defendant, whether it was of others or not, it is presumable that the conductor knew it, and the jury would be likely to think so, and the same is perhaps true prima facie under the proof of a general custom. But, as far as it applies to the question of good faith, it was competent for the defendant to show that there was no such rule or custom on the defendant's

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road, which would be consistent with the conductor's statement that he did not notice the description of plaintiff until after the ticket was punched, and did not act in bad faith in raising the question after punching the ticket, which was in a sense a usual and involuntary act, on receipt of any ticket. Such testimony was excluded, and was injurious, especially in the light of the following instructions given the jury:

"If you find that the conductor punched the ticket when presented to him in the first instance by Mr. Pierson, that fact alone would not constitute an acceptance of the ticket by the railway company, unless you shall find that the conductor so punched the ticket as an act of acceptance, and intending thereby to so accept the ticket, and the question of the length of time the conductor had in which to decide the question of whether or not he would accept the ticket is immaterial. The defendant is bound by his act, whether he had much or little time in which to make his decision."

And his refusal to give the following requests:

"If you should find that the conductor, in taking up the ticket from plaintiff in the first instance, either through mistake, or by reason of being hurried in his duties, did not notice any discrepancy between the personal description contained in the ticket and the personal appearance of the plaintiff, neither he nor the defendant were bound to retain that ticket as transportation for the plaintiff without demanding personal identification, the same as the conductor might have done in the first instance if he had noticed the discrepancy, and, after noticing it, it was his duty, and he had the right and privilege as representing the defendant, to bring the matter to the attention of the plaintiff and demand that the plaintiff either pay his fare in cash or reasonably identify himself so that the conductor might be reasonably assured that the plaintiff was a bona fide holder of the ticket or leave the train. Of course, in making any such demand upon plaintiff, it was the duty of the conductor to tender the ticket to the plaintiff."

Which request was refused and defendant excepted, and which should have been given.

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The following request should also have been given:

"It appears in evidence that the plaintiff had with him sufficient money with which to pay his fare in cash, and I instruct you that you may take that fact into consideration in arriving upon your verdict in this case, under the instruction given you by the court."

Which request was refused, and defendant excepted. It was proper in mitigation of damages, as was the testimony excluded, hereinbefore referred to.

The judgment should be reversed, and a new trial ordered.

OSTRANDER, J. If it is agreed, as it appears to be, that the regulation calling for identification of the ticket holder is a reasonable one, the vital point in the case is whether the regulation was reasonably enforced. Reasonable enforcement of it was provided for in the contract. Unreasonable enforcement might be a trespass. The declaration does not count upon a misdescription of defendant in the ticket. The court instructed the jury:

"If you shall find as a fact, from the evidence in the case, that plaintiff purchased the ticket on which he was riding * * * and paid the fare demanded, and in purchasing the ticket used no fraud, but acted in good faith, then I charge you that. if there was any mistake made in the description of plaintiff on the ticket, it was a mistake for which defendant was liable, and your verdict must be for the plaintiff."

Immediately following this, and the two quotations from the charge here given are not qualified and appear to cover the subject, the court said:

"Defendant company, being a common carrier of passengers for hire, cannot limit its liability for the negligence of itself or its agents by any contract contained in the ticket purchased by plaintiff, on which ticket he was seeking transportation."

The testimony of the conductor who put plaintiff off the train is that the ticket did not describe the plaintiff. He further testified that he told plaintiff the ticket did not

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describe him. It appears that the supposed lack of correspondence between the description and the man is what caused the demand for identification. Upon this testimony and charge, it seems to me that a verdict for plaintiff was inevitable. The instruction was both erroneous and prejudicial, because it condemns defendant for negligence not alleged as ground for recovery, and because it furnishes ground for the verdict, whether the regulation in question was or was not reasonably enforced.

Except as herein stated, I concur in the opinion of Mr. Justice MCALVAY. For the error pointed out, I think the judgment should be reversed, and a new trial granted.

CARPENTER, GRANT, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred with OSTRANDER, J.

PEPIN *v.* NAULT.

1. LOGS AND LOGGING—LIENS—ATTACHMENT—PROCESS—RETURN—SUFFICIENCY.

   In attachment proceedings under the log lien law, a return by the officer serving the writ that the owners are nonresidents, and that within the life of the writ he has served a resident agent of the owners, is good, since it follows the statute (section 10761, 8 Comp. Laws).

2. PROCESS—SERVICE—RETURN—AMENDMENT—EFFECT.

   The filing of an amended return of service of a writ of attachment does not have the effect of entirely superseding the original return unless so intended, and jurisdictional averments in the original will be given effect though not repeated in the amended return.

MCALVAY, C. J., dissenting.

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Error to Marquette; Stone, J. Submitted January 9, 1907. (Docket No. 154.) Decided July 13, 1907.

Attachment proceedings under the log lien law by Napoleon Pepin against Louis Nault, Fred Nault, and Edward Nault, copartners as Nault & Sons, and W. B. Kibbee and R. P. White, copartners as Kibbee & White. There was judgment for plaintiff, and defendants Kibbee & White bring error. Affirmed.

M. J. Kennedy, for appellants.

T. J. Dundon, for appellee.

MCALVAY, C. J. Plaintiff, claiming a lien on certain logs for personal work and labor thereon, began a suit in attachment May 3d, 1904, in justice's court in Marquette county, under the log lien statute, to enforce his lien therefor. The writ of attachment was issued, and made returnable May 14, 1904. It was personally served on the principal defendants May 7th. The return further shows:

"And on the 11th day of May, A. D. 1904, at the city of Marquette, in said county, I served upon F. M. White, personally, a true copy of the annexed writ and inventory duly certified by me; the said F. M. White being agent of the owners of the goods and chattels mentioned in said inventory, and the owners of said goods and chattels, and Kibbee & White being nonresidents of this State, and they, or either of the said owners, could not be found by me within this State."

The writ of attachment with this return attached was returned and filed with the justice on May 13th, the day before the return day thereof. On the return day, May 14th, the log owners appeared specially by their attorney and moved to quash the writ and proceedings for the reasons:

1. Because the officer had not served the writ by leaving a copy thereof and of the inventory with any person in whose possession the property was found.

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2. Because substituted service was made upon the agent and the writ returned before the return day.

Although requested so to do, the justice declined to rule upon this motion, and the attorney for the log owners then withdrew and took no further part in the proceedings before the justice. On the motion of the plaintiff, after issue joined with the principal defendants, the case was adjourned until June 15, 1904, on which day plaintiff was permitted to file an amended return. This, so far as it affected the log owners, is as follows:

"And on the 11th day of May, A. D. 1904, at the city of Marquette, I served on F. M. White personally a true copy of the annexed writ and inventory duly certified by me, the said F. M. White being the agent of the owners of the goods and chattels mentioned in said inventory, the said owners Kibbee & White not being found by me within this State, * * * and I do further return that the said owners, or either of them, have no last place of residence within this State."

The amended return also showed that the property was not in the possession of any person, but was solidly frozen in the ice. It also recites the giving of a statutory bond and the release of the logs on May 5, 1904. The justice then passed upon and overruled the motion to quash above referred to. On this day a trial was had and a judgment rendered in favor of the plaintiff and against the principal defendants, declaring that plaintiff had a lien upon the property (logs) for the amount thereof. The log owners removed the case to the circuit court for Marquette county by certiorari, and from a judgment of the circuit court affirming the judgment of the justice they have brought the case to this court by writ of error.

The question in the case is whether there was any proper service of process to give the court jurisdiction to render a judgment for a lien upon the property. In this case, an amended return was made by the officer, and, if jurisdiction was obtained by the court, it must appear from this return, the material portions of which have been

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quoted. The facts in regard to the service in this case and in the case of *Reynolds* v. *Marquette Circuit Judge*, 125 Mich. 445, are identical, with the exception that the return in this case had the additional statement:

"That I have made diligent search and inquiry and am unable to find Kibbee & White [the owners of the property], or either of them, within this State, and I do further certify and return that said owners, or either of them, have no last place of residence within this State."

We do not think that this return distinguishes the case from the *Reynolds Case*, supra. In the case at bar, service on the agent was made three days before the return day, and the writ was returned one day before the return day. Both these acts were premature, and the return does not negative the fact that either or both parties might have been within the State and been found had diligence been used during the entire time allowed by the writ. There was no proper service of this writ. *Reynolds* v. *Marquette Circuit Judge*, supra, and cases cited. The court erred in affirming the judgment of the justice.

The judgment of the circuit court should be reversed, with costs, and a judgment entered vacating and setting aside said justice's judgment as a lien upon appellants' property.

OSTRANDER, J. The sheriff, in the first return to the writ of attachment, certified that the owners of the logs were nonresidents of the State and could not be found within the State. It is evident from the record that the justice of the peace and the circuit judge supposed they had the right to, and that they did, rely upon this certificate, although the officer made another or further return, called an amended return, which omits any reference to the subject of the residence of the log owners. The owners of the logs were not the defendants in the attachment suit. In such a case, the statute method of service and the command of the writ is:

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"The officer executing said writ shall serve or cause to be served a copy of said attachment on or before the return day mentioned in said writ upon the owner of said products, or any of them, their proper agent or attorney, if such owner, agent or attorney be known to him, as residing in this State." 3 Comp. Laws, § 10761.

If the owners of logs who are not defendants in the attachment suit are nonresidents of the State, it is insensible to require the officer to carry the writ until the return day for the purpose of making service on them. If the officer certifies in his return that the owners are nonresidents, and that within the life of the writ he has served a resident agent of the owners, it is a good service, because in such case the officer has followed precisely the command of the statute. The question is, therefore, whether we must treat the later and amended return of the officer as superseding entirely the first return. The amended return appears to have been made to meet objections made by counsel for the log owners in the motion to dismiss the proceeding. I find nothing which requires the inference that in making the amended return it was intended to dispute or to recall the statement in the first return respecting the nonresidence of the log owners. The circuit judge in his opinion carefully, and in my judgment correctly, distinguished this case and *Reynolds* v. *Marquette Circuit Judge*, 125 Mich. 445.

The judgment should be affirmed.

CARPENTER, GRANT, BLAIR, MONTGOMERY, HOOKER, and MOORE, JJ., concurred with OSTRANDER, J.

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TUBBS v. HAESSIG.

1. FALSE IMPRISONMENT — PLEADING — JUSTIFICATION — ARREST WITHOUT WARRANT.
   In an action for false imprisonment, the facts amounting to a justification of the arrest must be pleaded, and this is especially true when the arrest was without a warrant.

2. SAME—BURDEN OF PROOF.
   The burden is upon the defendant in false imprisonment to justify the arrest in accordance with his notice of defense.[1]

3. SAME—QUESTION FOR JURY.
   Where there is evidence upon both sides of the question whether plaintiff in false imprisonment committed an assault in the presence of the defendant, an officer, justifying his arrest without a warrant, it is error to direct a verdict for defendant.

Error to Kent; Perkins, J. Submitted January 11, 1907. (Docket No. 34.) Decided July 13, 1907.

Case by George W. Tubbs against George H. Haessig for false imprisonment. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

Dunham & Malcolm, for appellant.

Moses Taggart and *S. W. Barker*, for appellee.

MCALVAY, C. J. This is an action of trespass for false imprisonment. The case arose out of an arrest of the plaintiff made by defendant, who was a police officer. The arrest was made at the Morton House, in the city of Grand Rapids, on December 22, 1904, and plaintiff was taken to police headquarters and locked up, and was later

[1] As to burden of proof as to authority for arrest in action for false imprisonment, see note to *McAleer* v. *Good* (Pa.), 10 L. R. A. (N. S.) —.

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released on bail. The officer placed a disorderly charge against him in police court, but it was not prosecuted. The next day one of the women prosecuted him for assault and battery. On an appeal to the circuit court he was acquitted.

Defendant under his plea gave notice of justification of the arrest, because of the conduct of plaintiff in the presence of defendant in causing a noise, disturbance, and gathering of the people, in violation of the disorderly ordinance of the city of Grand Rapids. The claimed disturbance arose between plaintiff and the women, sisters of his deceased wife, and aunts of his young daughter, who was with him, relative to the interference of the women in regard to the possession of the child. At the close of the testimony a motion was made by defendant's attorney that a verdict be instructed by the court for defendant on the ground that under the circumstances defendant was justified in making the arrest. The motion was granted and a verdict of no cause of action was directed, and a judgment duly entered thereon. Defendant excepted to this action of the court, and the errors assigned are upon the reasons given by the court and his conclusions of law in determining that such verdict should be entered. The reasons and conclusions of the court upon granting defendant's motion are as follows:

"Gentlemen of the jury, pursuant to the practice in this court, it is necessary for the court to state upon the record its reasons for taking a case from the consideration of the jury and directing a verdict. In this case, after careful consideration, I have come to the conclusion that, under the undisputed facts in this case, it is the duty of the court to so direct you.

"The questions involved in this case are two:

"(1) Was there a disturbance of the peace on the date in question, at the place in question? And,

"(2) Was that disturbance of the peace committed in the presence of the officer?

"It does not matter to you or to the court in this case as to what the respective rights of these parties were as to the custody of this child that seemed to have been in

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controversy, nor does it matter to us at this particular time as to whether or not the ladies in question, or the plaintiff in this case, happened to be to blame for the creation of the disturbance. As I have had occasion to say to counsel, if a police officer or a peace officer must see to it that he only arrests persons not to blame for a disturbance of this kind, notwithstanding they may be participants therein, there would be no one willing to make arrests without a warrant, and the public tranquility would be disturbed by the promulgation of any such rule of law as that, as it seems to the court.

"The peace officer has a duty resting upon him to immediately arrest those who may be engaged in a public disturbance, regardless of the question as to whether the person he happens to arrest is to blame for the disturbance, providing that person is engaged in such disturbance and is a cause thereof, or contributes thereto.

"The plaintiff himself testified upon the witness stand that, from the time that he encountered these two women at his carriage until he was arrested in the Morton House entrance, there was more or less disturbance on account of the controversy between himself and his sister-in-law as to the custody of this child. He also testifies that a crowd almost immediately began to gather and followed them to the Morton House entrance, and through the entrance; that the crowd was attracted by reason of the efforts of each of the parties to gain possession of this child; that there were various expressions from the crowd of a violent nature; and that there was more or less excitement at the time of his arrest. It also appears that more or less violence was being exercised, not only by plaintiff, but by these women, to gain possession of this child. These facts are practically undisputed, and under this undisputed evidence in the case I instruct you that there was a disturbance of the peace, as that term is used in the law.

"If the plaintiff had denied any such disturbance and the witnesses on the other side had testified to a disturbance, then it would have become a question of fact for you to determine as to whether under all the facts and circumstances there was such a public disturbance as would authorize an arrest without a warrant; but, where it appears to be undisputed upon both sides that there was a disturbance, the next question that arises is as to whether that disturbance was in the presence of the offi-

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cer. This is also an undisputed point in the case. He was standing at or near the corner of Monroe and Ionia streets at the time in the performance of his duty as a police officer of the city, and in full view of the parties as they came up the street and entered the Morton House door. Further than that, as he came into the crowd as it gathered in the corridor of the Morton House, whether he had passed through the first entrance or not is immaterial, there the crowd was, there the shouts were being made, and there the plaintiff was, the child, and these women, the disturbance was there in his view, in his presence, and it was his duty as a police officer and a peace officer to make the arrest of one or the other or all of the participants. They were all equally guilty of causing a public disturbance, whether it was the women or whether it was the man. If he had arrested the women, he would have been equally justified. He happened to arrest the man, and the same rule will follow as to that.

"The rule is stated here with reference to that, 'in general, all persons engaged in a breach of the peace are principals,' and these two women and the plaintiff in this case, Mr. Tubbs, must be considered as principals in this disturbance of the peace.

"Therefore, gentlemen, a breach of the peace having been committed, and it having been committed in the presence of the officer, the arrest without a warrant was justified under the law, and I so instruct you. The clerk will take your verdict of no cause of action."

Plaintiff's claim in this case was that he had driven into the city with his young daughter; that he had hitched his team near the Morton House, and visited his attorney, taking with him his daughter; that coming from his attorney's office he met Miss Reen, an aunt of the child, who attempted to caress her, and was told by him to leave the child alone; that he walked to the buggy, and lifted the child into it, and went towards the heads of his horses, intending to unhitch them and saw Mrs. Brower, a sister of Miss Reen, approach the buggy, reaching up as if to remove the child; that to get the child away from these women he stepped to the buggy, lifted her out, and started to carry her into the Morton House; that Mrs. Brower followed rapidly, catching hold of the child when going

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up the hotel steps, and held onto her; that plaintiff walked in through the vestibule nearly to the elevator where he was arrested by defendant; that after he told Miss Reen to keep away he spoke to no one until he was arrested; that he struck no one, and did nothing except to attempt to get his child into the hotel and away from these women. This claim is supported by his own testimony and that of several witnesses. That he took the child to get away from them and that they followed him, when they knew that he was trying to get away, is admitted by both women. On the part of the defendant, whose defense appears in the notice given below, the testimony of the two women, the defendant, and others was offered tending to show that plaintiff struck the women. That there was a disturbance was admitted, but that plaintiff was a party actively engaged in creating such disturbance was denied, and upon this question there was a sharp disagreement between the witnesses. The record shows that there was some feeling between plaintiff and his deceased wife's sisters relative to this child.

The following is defendant's notice of justification given with his plea:

"Upon the occasion alleged in said declaration defendant's attention was called to a disturbance, commotion, and gathering of people near the Monroe street entrance of said hotel at which time defendant saw plaintiff ascend the steps of said hotel, accompanied by a lady and a small girl, at the same time and place and in the presence of defendant said plaintiff struck said lady with his hand, causing her to stagger and fall back. That defendant hastened to the scene, but did not arrive until plaintiff with said lady and girl had entered the inner door of said hotel, and that then and there plaintiff caused another disturbance, commotion, and large gathering of people by taking a firm hold of said lady, holding her and refusing to let go his hold of her. That Mr. Rathbone, a man having in charge said hotel, upon seeing the disturbance, rushed to the aid of said lady, and had about broken plaintiff's hold on said woman at the time that defendant arrived and said Mr. Rathbone then and there requested de-

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fendant to place plaintiff under arrest, which defendant did, after finally separating them. That the same was done in accordance with defendant's instructions and general duties as a police officer of said city.

"This defendant then and there knew that plaintiff had violated the disorderly ordinance of said city of Grand Rapids by assaulting and striking said lady, which caused a noise, disturbance, and large gathering of people, the violation of which was a misdemeanor under the city ordinance or laws of the city of Grand Rapids, Mich., which misdemeanor, as before alleged, was committed in the presence and sight of defendant; whereupon defendant placed plaintiff under arrest and caused him to be taken to the police station of said city in the regular course of defendant's duties.

"That the following morning after said arrest defendant went to the police station of said city and conferred with the police judge of the city of Grand Rapids, assistant city attorney of the city of Grand Rapids, and the assistant prosecuting attorney for the county of Kent, and offered then and there to swear to a complaint charging plaintiff with violating the disorderly ordinance of the city of Grand Rapids, but they decided that the offense was of such a nature that a charge of assault and battery should be placed against plaintiff instead of disorderly conduct; whereupon complaint was sworn to against plaintiff for assault and battery, upon which complaint plaintiff was duly tried before the judge of police court of said city and convicted, which cause was appealed to the circuit court for the county of Kent, retried before a jury, said jury deliberating for a great many hours and finally returning a verdict of not guilty."

It was necessary to give this notice, and—

"It is manifestly of more importance to the plaintiff that he should be informed by the plea of the facts relied upon for his arrest without a warrant than when he is arrested upon a warrant, which he has the right to see and read when he is arrested." *White* v. *McQueen*, 96 Mich. 249.

The gist of this notice is "that plaintiff had violated the disorderly ordinance of said city of Grand Rapids *by assaulting and striking said lady, which caused a noise, disturbance, and large gathering of people.*"

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The complaint made by the officer the next day after the arrest charged that plaintiff "did engage in a fight, quarrel, and disturbance in the presence and hearing," etc., contrary to the provisions of "an ordinance relative to disorderly persons." *No warrant was issued based upon this complaint and no prosecution was had upon it.* The officer who made the arrest and swore to the complaint testified:

"*Q.* Did you arrest Mr. Tubbs because Mr. Rathbone told you to take the man out of here?

"*A.* Because he struck that lady and had a firm hold on her when I got inside; breach of the peace; disorderly.

"*Q.* What was it he did, or to your mind was a breach of the peace?

"*A.* Striking the lady.

"*Q.* At the door?

"*A.* Yes, sir; having hold of her was enough.

"*Q.* You base your cause of arrest, because you saw him strike the blow, is that it?

"*A.* Strike the blow and having hold of her."

The issue tendered by this plea and notice was tried. The burden of proof was upon defendant to justify the arrest in accordance with his notice. Evidence was offered upon both sides. The disputed question was one of fact for the jury.

The court was in error in directing a verdict for defendant.

The judgment is reversed, and a new trial granted.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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WHITMORE *v.* IONIA PROBATE JUDGE.

1. DRAINS—STATUTES—REPEAL.
   Act No. 612, Local Acts 1905, repealing the general drain law with respect to Ionia county, does not repeal, as to Ionia county, the law governing the construction of drains through several counties.

2. STATUTES—REPEAL—IMPLICATION.
   Repeals by implication are not favored.

Certiorari to Ionia; Davis, J. Submitted February 12, 1907. (Calendar No. 21,713.) Decided July 13, 1907.

Mandamus by Monroe W. Whitmore, Elon P. Potter, and John F. Kohn, drain commissioners of Clinton, Gratiot, and Ionia counties, to compel Montgomery Webster, probate judge of Ionia county, to appoint special commissioners in certain drain proceedings. There was an order denying the writ, and relators bring certiorari. Reversed and writ granted.

William M. Smith and *R. A. & W. E. Hawley*, for relators.

Morse & Locke, for respondent.

GRANT, J. The relators, commissioners, respectively, of Clinton, Gratiot, and Ionia counties, took the steps provided by chapter 106, 2 Comp. Laws, to construct a continuous drain traversing the three counties. The provisions applicable to such a proceeding are found in sections 4371 to 4378, inclusive. The proceedings were regular under that statute, and it is immaterial to set them out in detail. The probate judge of Ionia county, where the proceedings were commenced, refused to appoint special commissioners, holding that Act No. 612, Local Acts 1905, applied to drains running through several counties, as well as to drains located entirely within the

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county of Ionia. The commissioners then applied to the circuit court for the county of Ionia for the writ of mandamus to compel the probate judge to entertain the application and appoint commissioners. The circuit court refused to grant the writ, holding to the same effect as did the probate judge. The case is now before us for review on the writ of certiorari.

Act No. 612 was before us in *Rice* v. *Ionia Probate Judge*, 141 Mich. 692, and is there given in full. We need not here repeat any of its provisions. This proceeding was taken by the commissioners before the enactment of Local Act No. 612.

The sole question is: Does that local act repeal or supersede the general law in regard to drains traversing several counties? Repeals by implication are not favored. There is no language, either in the title or the body of that act, referring to or showing any intention to repeal or supersede the general law covering the construction of drains through several counties. All its provisions relate, and are applicable, to drains located entirely within the county of Ionia, and to the action of the one commissioner of that county acting independently in the construction of local drains. We think the act cannot be extended to include the law governing the construction of drains through several counties.

Some other questions are raised as to the location and construction of this drain and its effect upon Maple river. It is to be presumed that the commissioners will proceed according to law. If they shall undertake to unlawfully interfere with the riparian rights of landowners along that stream, and to unlawfully divert or otherwise affect the flow of water therein, such owners can obtain relief in the proper proceeding.

The judgment is reversed, and the probate court directed to proceed under the statute.

MCALVAY, C. J., and CARPENTER, BLAIR, and MONTGOMERY, JJ., concurred.

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FITZPATRICK *v.* MICHIGAN CENTRAL RAILROAD CO.

1. RAILROADS—PERSONAL INJURIES—PERSON WORKING ON CAR—CONTRIBUTORY NEGLIGENCE.
   In an action against a railroad company for injury to a servant of a lumber company by moving without warning a car into which he was loading lumber, evidence examined, and *held*, to be a question for the jury whether plaintiff was negligent in pursuing his labor in reliance on receiving a customary warning from defendant's servants.

2. SAME—WARNING—FAILURE TO GIVE—NEGLIGENCE.
   Where a railroad company's servants were required by its rules to give warning to persons working about cars before moving them, and it was customary to do so, a failure to give the customary warning before moving the cars was negligence.

3. MASTER AND SERVANT—NEGLIGENCE OF SERVANT—INJURIES TO THIRD PERSONS—LIABILITY OF MASTER.
   A railroad company is liable for an injury to the servant of a lumber company caused by the negligence of train operatives while switching cars in the lumber company's yard, the lumber company having no control over the train operatives further than to inform them what switching was to be done.

Error to Bay; Collins, J. Submitted April 3, 1907. (Docket No. 4.) Decided July 13, 1907.

Case by Dennis Fitzpatrick against the Michigan Central Railroad Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Cooley & Hewitt (*Henry Russell* and *O. E. Butterfield*, of counsel), for appellant.

De Vere Hall, for appellee.

MONTGOMERY, J. This is an action to recover for personal injuries. The plaintiff was, on the 20th of Novem-

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ber, 1903, engaged in inspecting and loading lumber from the mill of Mershon-Schuette-Parker Company into a car of defendant company. The cars of defendant were placed upon a spur track on the northerly side of the mill of plaintiff's employers, to whom the track belonged. The mill had eight doors on its northerly side, numbered consecutively, beginning at the westerly end. The mill floor was practically on a level with the floor of cars, so that when cars were placed with their doors opposite the doors of the mill lumber could be conveniently loaded from the mill to the cars. On the afternoon of the day in question plaintiff with a helper was engaged in loading lumber into a car opposite, which was the most easterly car, and the one farthest from the engine. The car was so placed that but 12 to 13 inches of space was left through which to shove the lumber, and this space was at the westerly side of the mill door. The plaintiff had finished placing in the car such lumber as it was intended to load into the car at the mill, with the exception of one board which he had occasion to have replaned. The conductor of defendant's train went into the mill to get his orders for switching from Mr. Shea, the foreman of plaintiff's employers. At this time plaintiff was awaiting the return of his helper with the replaned board. The conductor and Shea passed out through door No. 3, and through the car standing opposite. The conductor was directed to relocate the cars in order that the loading might be completed. No notice of the intended movement of the cars was given to plaintiff. The northerly door of the car into which plaintiff was loading was closed. When the conductor had passed through car No. 3, he notified the men working in the cars, and as he walked down the side of the cars on this spur track he shouted and waived his hand to those employés who were seen in the vicinity of the cars. Then on a signal from him the engine coupled onto the cars which stood on the spur from the westerly end thereof, and within a minute thereafter started to pull them out. Neither the con-

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ductor nor any of the crew saw Fitzpatrick, and they afterwards learned that he was injured by this second movement of the cars. As the cars moved west, plaintiff was engaged in putting the last board in the car, and was caught between the car and the mill and severely injured.

There was some conflict in the testimony as to whether it was customary for the northerly car doors to be closed before the car was completely loaded. There was also some conflict upon the question of whether, when the trainmen found the northerly car door closed, it was customary for the trainmen to give any signal at that car. There was testimony on the part of plaintiff that the northerly door of cars was at times left closed while the loading was being done, and that when the door was so closed it was customary for the trainmen to give notice of the intended movement of the car by tapping on the door. There was also testimony tending to show that the trainmen had on previous occasions gone through the mill and given warning to the men that the cars were to be moved. The testimony was abundant that the trainmen were accustomed to notify the men engaged in loading, and were required to do so by the rules of the company. The conductor testified that the tapping of the engine bell couldn't be heard inside the mill on account of the noise of the machinery, and further testified as follows:

"*Q.* The only signal that you gave, that is, the Michigan Central employés give, would be the bell, wouldn't it?

"*A.* No, sir.

"*Q.* What other?

"*A.* I notified them when they were working.

"*Q.* Was your instructions to notify the men?

"*A.* Yes, sir.

"*Q.* You have instructions from the Michigan Central that before you pull a car out to notify the men?

"*A.* That is true.

"*Q.* That is, from your employer?

"*A.* Before we move cars where men are working we notify them.

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"Q. Did you?
"A. Yes, sir.
"Q. Did you notify them that day?
"A. Yes, sir.
"Q. Did you notify Mr. Fitzpatrick?
"A. I didn't see him.
"Q. Well, you didn't notify him?
"A. No, sir."

On recross-examination, he said further:

"The instructions [were] before we move any cars, when men is working around. We don't handle the cars until we notify the men."

Under instructions, which in effect held defendant responsible for the acts and omissions of the trainmen on the occasion in question, and that it was a duty owed by defendant to the employés of Mershon-Schuette-Parker Company to give reasonable warning of the intended movement of the train, the plaintiff recovered, and defendant brings error, contending that plaintiff was guilty of contributory negligence, that there was no negligence in the management of the train, and that if there were negligence on the part of the train crew it was not negligence for which defendant was responsible.

We are not able to say that the plaintiff was guilty of contributory negligence, as matter of law. True, he knew that the cars were liable to be moved at any time, and that he was engaged in putting the last board into the car; but, if the testimony of plaintiff's witnesses be given credence, he also knew that it was the custom of the train crew to give notice to the employés, either by informing them directly by words, or by tapping on the door of the car at which they might be engaged, when the northern or outer door was closed. With a knowledge of this custom the plaintiff might reasonably be found by the jury to have been free of negligence while pursuing his labor, expecting to receive warning when warning became necessary. This case is clearly distinguishable from *Johnson* v. *Railway Co.*, 140 Mich. 292, cited by defendant's counsel. In that case plaintiff was violating a rule of his

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employer, and knew that switching was going on at the time, and yet placed himself in a position of danger. In this case the custom had been to rely upon a warning. 2 Thompson on Negligence, § 1761.

Closely related to the question of contributory negligence and depending upon almost identical considerations is that of the negligence of defendant. The evidence shows that the defendant's train crew were accustomed to give warning to the men employed in and about the cars; that the instructions given them by their superiors required it. Clearly a failure to give the customary warning, which the mill employés might reasonably have expected, was a failure to discharge their duty and negligence. *Breeze* v. *Manufacturing Co.*, 140 Mich. 372; 2 Thompson on Negligence, supra.

Was the defendant responsible for the acts of its trainmen, or was their negligence, if any, to be imputed to Mershon-Schuette-Parker Company? The conductor of the train testified as follows:

"*Q.* The only instructions the foreman of the lumber company gives you is the instructions as to which cars to take out, is it not?

"*A.* Yes, sir.

"*Q.* And where to place them if they are not fully loaded?

"*A.* Yes, sir.

"*Q.* He gives you no further instructions at all, does he?

"*A.* No, sir.

"*Q.* You have the whole movement of the cars under your control, do you not?

"*A.* Yes, sir.

"*Q.* And you give the signals?

"*A.* I do.

"*Q.* That is, you and some other trainmen give the signals to the engineer?

"*A.* Yes, sir.

"*Q.* The engineer wouldn't have any authority to respect any signal that Mr. Shea gave, would he?

"*A.* Oh, no.

"*Q.* And he wouldn't respect it?

"*A.* No, sir.

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"*Q.* And no person about the lumber company has any authority to direct the movement of the engine?
"*A.* No, sir.
"*Q.* Or of your cars?
"*A.* No, sir.
"*Q.* You move your cars there just the same in all particulars as you would on any switch track, do you not?
"*A.* Yes, sir.
"*Q.* And as you would on any main track?
"*A.* Yes, sir.
"*Q.* The question as to who owns the tracks you don't know anything about?
"*A.* I couldn't say."

Upon the question of respondeat superior the case is certainly as strong for the plaintiff as was *Joslin* v. *Ice Co.*, 50 Mich. 516, which the defendant seeks to distinguish. The case of *McInerney* v. *Canal Co.*, 151 N. Y. 411, cited by defendant's counsel, is not consistent with *Joslin* v. *Ice Co.*, supra. The latter case lays down no new rule, nor does it stand alone. The case of *Breeze* v. *Manufacturing Co.*, supra, fully supports plaintiff's contention in this case. In that case, answering the contention that MacKinnon Brothers were responsible for the negligence of the railroad company's employés on the ground that they were agents of MacKinnon Brothers, because switching cars in their yard, Mr. Justice HOOKER said:

"This claim cannot be sustained. The MacKinnon Company had no supervision or control over the railroad company, or its men. The company was an independent contractor, responsible for its own negligence."

See, also, 1 Thompson on Negligence, §§ 621, 646.

No error appearing, the judgment is affirmed.

CARPENTER, BLAIR, HOOKER, and MOORE, JJ., concurred.

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KLEIN *v.* POLLARD.

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1. ARREST—WITHOUT WARRANT—PROPRIETY.

A police officer is not justified in arresting without a warrant a woman quietly walking on the street at a late hour of the night, though she has just emerged from a disreputable saloon, there being nothing to indicate that she is plying a prostitute's vocation, or intends to do so, by solicitation.[1]

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2. FALSE IMPRISONMENT — DAMAGES — MITIGATION — EVIDENCE — POLICE ORDERS.

In an action against a policeman for false imprisonment in arresting plaintiff without a warrant on suspicion that she was a prostitute, defendant is entitled to show in mitigation of damages that his superior officers ordered the arrest of all women found on the street at an unusual hour who failed to give a satisfactory account of themselves, though such arrest was unlawful.

Error to Wayne; Donovan, J. Submitted April 2, 1907. (Docket No. 2.) Decided July 13, 1907.

Case by Anna C. Klein against Edward J. Pollard for an assault and battery and false imprisonment. There was judgment for defendant, and plaintiff brings error. Reversed.

Plaintiff is the wife of one William C. Klein, who kept a saloon at 227 Jefferson avenue, in the city of Detroit. In the back part of his saloon was a room with tables for drinking and a bed. The saloon was one of ill repute and the resort of prostitutes. On one occasion a policeman found in this bed the bartender and a prostitute undressed, and arrested them. Mr. Klein kept his saloon open during the night, in open violation of the law, and apparently without any effort on the part of the city authorities to compel him to obey the law. The saloon is

[1] As to liability of an officer for making an arrest, see note to *Leger* v. *Warren* (Ohio), 51 L. R. A. 193.

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located in what is known as the "central precinct," in which are located many, if not most, of the disreputable houses of the city, and where common prostitutes and other criminal classes resort. Counsel for defendant in his brief says:

"Practically all disorderly places, houses of prostitution, etc., in the city of Detroit are in the central precinct, which embraces the territory between Hastings street and Fourth street, and running north to Charlotte avenue and Brewster street. Previous to the year 1905 (the time not being disclosed by the record) the number of lewd women plying their vocation on the streets and sitting in saloons waiting for company became so great that, to discourage the trade, a general order was issued to the officers and men of the central precinct to frequently visit all saloons catering to women trade and to bring in all women of known bad repute, or such as might be found on the street at an unusual hour and who failed to give a satisfactory account of themselves. As a result of this order over 400 women were brought in during the year 1905."

The proofs establish the above statement. The defendant is a policeman, and his beat in February, 1905, included Mr. Klein's saloon. Plaintiff and her sister, a girl 16 years of age, after spending the evening upon the streets, went to this saloon about 10:30 o'clock. The sister had made an appointment to meet one Nuss at Klein's saloon, where he played the piano. The women remained in the saloon until about midnight, when plaintiff's sister and Nuss went out. A few minutes afterwards plaintiff came out of the saloon, stood for a moment at the door, looking up and down the street, and then with her head hanging down walked out along the street. The defendant saw her, went to her, and asked her who she was. She testified that she told him who she was. Defendant testified that she told him it was none of his business. She testified:

"Is it not a fact, Mrs. Klein, that when you came out of that saloon you looked first right and left when you came to the door to see if the coast was clear, and then came down the avenue, with your head hanging down,

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that you went down Randolph, turned north on Randolph on the east side, and that the officer came along behind you, intercepted you by coming diagonally across Randolph, and intercepted you about half way between the alley and the corner—is that true?

"*A.* Yes, sir."

He then, in accordance with his instructions, took her to the police department before the lieutenant in charge. She told the lieutenant who she was, satisfied that officer that her statement was true, and was promptly dismissed. She brought this suit to recover damages for assault and battery and false imprisonment. The case was submitted to the jury who found a verdict for the defendant.

The charter of the city of Detroit confers upon the common council power to—

"Provide for the general peace, order and good government of said city. To 'prohibit and suppress the keeping and leasing of houses of ill-fame, or assignation, or for the resort of common prostitutes, disorderly houses, and disorderly groceries. It may restrain, suppress and punish the keepers thereof, and the owners and lessors of such premises; it may punish, restrain and prevent common prostitutes, vagrants, mendicants, street beggars, drunken or disorderly persons.' To enact all ordinances necessary to carry into effect the powers conferred by law upon said council, and to provide for the punishment of all persons offending against this act, or any law relating to said city, or any ordinance of the common council enacted under this or any other act of the legislature, by imposing fines, penalties, forfeitures and costs, and by imprisonment in the house of correction of said city." Charter of Detroit (1904), §§ 171, 183, 190.

The charter (§ 665) also provides:

"It shall be the duty of the commissioner of police and of the force hereby constituted, at all times of the day and night, within the boundaries of said city, to preserve the public peace and prevent crime, arrest offenders and protect the rights of persons and property, guard the public health, preserve order and enforce all the laws of the State and the ordinances of said city."

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Acting under this power the common council enacted the following ordinances:

"All able-bodied persons who, not having visible means of support, are found loitering or rambling about or lodging or loitering in drinking saloons, tippling houses, beer houses, houses of ill-fame, houses of bad repute, vessels, sheds or barns, or in the open air, and not giving a good account of themselves, * * * shall be deemed disorderly persons, and upon conviction thereof shall be punished as hereinafter provided.

"No person shall keep, within the limits of the city of Detroit, any house of ill-fame, house of assignation, or house for the resort of common prostitutes, or a disorderly saloon, bar-room, tavern, beer hall, grocery, theater, room, ordinary, house or building of any kind, or any house, room or building for gaming with cards, dice, billiards, nine or ten-pin alleys, wheels of fortune, boxes, machines or other instruments or devices whatever, or shall in any manner contribute to the support, carrying on or keeping of any such house or place."

The case was submitted to the jury who, after deliberation, returned a verdict for no cause of action.

Richard I. Lawson and *William G. Fitzpatrick*, for appellant.

Fred H. Warren, for appellee.

GRANT, J. (*after stating the facts*). 1. The court in his charge said to the jury that it was clearly proven that the saloon from which the plaintiff came at midnight was a disorderly one. The fact so stated is not denied. The court instructed the jury that, if the defendant's statement as to what happened between him and plaintiff was correct, he was justified under the law in taking the plaintiff to police headquarters for examination by the lieutenant in charge. This presents the principal question in the case. It is the contention of counsel for the plaintiff that her arrest was unlawful because it was without a complaint or warrant, and she was not suspected of having committed a felony, neither was she engaged in commit-

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ting a breach of the peace. *Tillman* v. *Beard*, 121 Mich. 475 (46 L. R. A. 215), and *Robison* v. *Miner*, 68 Mich. 549, do not control this case. In neither of those cases was there any excuse for arresting the party without obtaining a warrant. One was the case of a peddler in a street, the other the case of a saloonkeeper keeping his saloon open at a time prohibited by law. The duty imposed upon the police department to protect the city from vagrants, night-walkers, gamblers, and other sorts of criminals who ply their vocation largely in the night is an important and difficult one. No rule can be laid down governing all the circumstances under which a party under suspicion may be arrested. It is, however, established by a decision of this court (which seems to have escaped the attention of counsel of both parties and of the trial court, as it is not cited in their briefs) that the arrest of plaintiff was unlawful. *Pinkerton* v. *Verberg*, 78 Mich. 573 (7 L. R. A. 507). Police officers are not justified in arresting a person quietly walking the streets of the city at any hour of the night simply because he has emerged from a disreputable place. There is no evidence in this case to show that plaintiff was a prostitute, except the fact that she had been seen in her husband's disreputable saloon, and came therefrom late in the night. She was quiet, peaceable, making no disturbance, and there was nothing to indicate that she was plying a prostitute's vocation, or intended to do so, by solicitation. The chief difference between the facts of *Pinkerton* v. *Verberg* and those of this case are that in the former case plaintiff was arrested while peaceably walking the streets about an hour and a half earlier in the night than was the plaintiff in this case. In the former case the evidence on the part of defendant showed that the plaintiff was a prostitute, while in this case there is no such evidence. The defendant testified that he was in the saloon on the night in question, about a quarter of 11 o'clock, and that—

"It was my duty to go to this saloon every evening when I was on the beat nights, because it was disorderly,

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prostitutes frequent there and disorderly men and women. We went to look after it, and *put it in good running order*, and find who was there."

If the police department would, by complaints and arrests, enforce the law closing this saloon and others, as the law requires, it would much more effectually prevent disorder than the arrest of parties quietly walking the streets and apparently engaged in no criminal conduct. The better way "to put such places in good running order" is to compel obedience to the law which governs them. It follows that the arrest was unlawful, and the court should have so instructed the jury.

2. All circumstances which tended to show the good faith of the defendant were admissible in mitigation of damages. It was therefore competent to show the instruction of the defendant's superior officers in dealing with persons found upon the streets under circumstances in which the plaintiff was found.

Judgment reversed, and new trial ordered.

BLAIR, MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

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VAN BUREN *v.* STUBBINGS.

1. SALES—CONDITIONAL SALE—STANDING TIMBER.
   A contract of sale of standing timber under which the title is to remain in the seller and the lumber not to be removed from the place of manufacture until the purchase price is paid is a contract of conditional sale.

2. SAME—BONA FIDE PURCHASERS—CONTRACTS.
   Where the contract of conditional sale under which a person holds possession of standing timber is expressly referred to in the contract by which he sells it to another, no other notice of the terms of the original contract is necessary, and the original owner's title cannot be defeated except by a waiver upon which the subsequent purchaser has acted to his injury.

3. REPLEVIN—PARTIES.
   In replevin by the buyer of timber of one who held it under a contract of conditional sale, against the assignee of the owner of the land from which it was cut and who had sold it under said contract, other parties claiming interests in the estate of the assignor are merely nominal parties whose interests cannot be litigated in the suit.

4. COMPROMISE AND SETTLEMENT—FOREIGN SUIT—OPERATION.
   A buyer of standing timber under a contract of conditional sale sold the same to plaintiff for manufacture at mills both in this State and in Wisconsin. The buyer failed to pay for the stumpage and the landowner seized the manufactured lumber in Michigan and presented a claim against the buyer's assignee in Wisconsin which he afterwards compromised. *Held*, that such compromise did not settle a replevin suit brought by plaintiff in Michigan for the lumber seized by the landowner, nor operate to transfer title to the Michigan lumber to plaintiff.

Error to Gogebic; Shepherd, J., presiding. Submitted April 5, 1907. (Docket No. 22.) Decided July 13, 1907.

Replevin by Edgar R. Van Buren and Charles D. Bull, surviving partners of the Antigo Lumber Company,

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against Wilson H. Stubbings, the Union Trust Company, and others. There was judgment for defendants, and plaintiffs bring error. Affirmed.

The litigation in this case grows out of the financial failure of Hoxie & Mellor, copartners, 17 years ago. Their affairs became complicated, and suits arose in Michigan, Wisconsin, and Illinois. Several parties to the suits are dead. One feature of the litigation has been in this court. *National Bank of Oshkosh* v. *First Nat. Bank of Ironwood*, 100 Mich. 485. The statement of facts in the appellants' brief covers 42 pages. We are met at the commencement of the appellees' brief. with the statement—

"That the errors and omissions in printing the bill of exceptions, coupled with inaccurate statements as to the issues involved, render a statement of facts upon our part imperative."

Then follows a statement covering 40 pages. The difficulty and labor involved on the part of this court in making a concise and intelligent statement is apparent. The briefs of counsel cover, respectively, 179 and 297 pages, and are occupied mainly with a discussion of disputed issues of fact. We will, however, state as briefly as possible the facts which we conceive to be essential.

One Stubbings, being the owner of certain lands, made a preliminary contract October 8, 1889, with one Hutchinson, to sell and convey to him the pine timber thereon, estimated at 10,000,000 feet. The preliminary contract provided that the terms of the completed agreement of sale should be as follows: Hutchinson was to pay the taxes on the timber and land until the timber was cut and removed, to pay $500 cash, $2,000 when the completed agreement was made, and good negotiable notes for $10,000; balance price of $40,000 to be paid in one year from date of completed contract, with interest at 7 per cent. It further provided that:

"The title to said timber shall remain in said Stubbings

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until the purchase money, interest and taxes herein mentioned are fully paid; and such purchase money, interest and taxes shall remain and be a lien upon said pine timber and the lumber manufactured therefrom, wherever the same may be, until such purchase money, interest and taxes are fully paid. The lumber sawed from said pine timber is not to be removed from place where manufactured until said purchase money, interest and taxes are paid. The one-half of said timber situated nearest the mill of the firm of Fair Brothers at Marenisco, the said Hutchinson shall have sawed and piled at the said mill by said firm, provided he can contract with said firm to do said sawing at rates as reasonable as he can obtain elsewhere, but said Hutchinson shall not pay said firm for said sawing and piling and shipping at less than $2.50 per thousand feet. The said Hutchinson shall have the right to enter upon, and take possession of the said described lands for the period of three years from date hereof, for the purpose of removing said timber under this contract, and in accordance with the condition to cut and remove to such mill as may be most convenient to him for the purpose of manufacturing, and that contract shall be good to Hutchinson or his assigns."

Two days afterwards Hutchinson assigned this preliminary contract to Hoxie & Mellor. The completed contract was not executed until May 9, 1890. That contract was not assigned to Hoxie & Mellor. Hoxie & Mellor proceeded to cut the timber under the contract of October 8th. The completed contract was substantially the same as the preliminary. The timber was to be removed within three years from the 8th day of October, 1889. That contract was, immediately after its execution, recorded in the office of the register of deeds of Gogebic county, and on June 12th was recorded at Antigo, in Langlade county, Wis.

Plaintiff, a copartnership known as the "Antigo Lumber Company," had two contracts with Hoxie & Mellor for the purchase of lumber, to be manufactured by them; one dated September 24, 1889, and the other January 8, 1890. The latter contract included not all the lumber, but only certain grades of it to be manufactured from the

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Stubbings logs. It expressly included the lumber to be manufactured "from the logs and timber purchased by said first parties (Hoxie & Mellor) from W. W. Hutchinson by assignment by said Hutchinson of a contract between Hutchinson and W. H. Stubbings, dated October 8, 1889, and assigned to said first parties October 10, 1889." The contract provided that the lumber was to be manufactured in a certain mill at Antigo, Wis., and at Marenisco, Mich. It provided terms of payment. Hoxie & Mellor were considered responsible, and unfortunately the Antigo Lumber Company made large advances greatly in excess of the lumber received. Hoxie & Mellor failed September 6, 1890. Prior to their failure, there had been manufactured in the mill at Antigo 2,352,148 feet, of which the plaintiffs had shipped 1,757,666 feet. There had been manufactured and piled in Marenisco 909,068 feet, none of which had been shipped, and which is involved in this suit. Mr. Stubbings claims that he was in possession of the lumber in the millyard at Marenisco, and marked it with his initials prior to the failure. This is disputed by the plaintiffs. Plaintiffs also had placed their marks upon it, but had done no further act indicating possession. Immediately upon the failure, Mr. Stubbings took possession under his contract. Plaintiffs, claiming title to the lumber, brought this action of replevin December 2, 1890, gave Mr. Stubbings a bond as the statute requires, took possession of the property, and sold it. For reasons, perhaps, unnecessary to state, this suit was not tried until 1905. Plaintiffs claim to be innocent purchasers without any knowledge of Mr. Stubbings' rights; that the contract between him and Hutchinson was in effect a chattel mortgage, and not a conditional sale; that he waived his claims under the contract; that the plaintiffs acted upon such waiver to their prejudice; and that therefore Stubbings and his assignee, the Union Trust Company, are estopped to assert title under the contract. All the disputed issues of fact were submitted to the jury, who found a verdict for

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the defendants for the amount due on the Stubbings contract.

The court instructed the jury that, if they found that Stubbings by words, acts, or conduct, waived the rights which he had to hold the lumber until the whole contract price was paid, and that the plaintiffs acted upon that waiver, they should find for the plaintiffs. The court also instructed the jury that Stubbings' assignee, the Union Trust Company, could recover only what was now due upon the contract, with interest thereon. It was conceded that, if the jury found for the defendants, the amount so due was $39,381.48, which was the amount of the verdict. The court further instructed the jury that the preliminary and completed contracts were in effect the same; that Hoxie & Mellor succeeded to all the rights of Hutchinson thereunder; that the contract was one of conditional sale; that plaintiffs were charged with the knowledge of its contents, and took the assignment subject to the rights of Mr. Stubbings therein. There were other issues of fact submitted to the jury, which it is immaterial to mention. Any further statement of facts essential will be made in connection with the points raised.

Herb. M. Norris (*Hurley & Jones* and *M. B. Rosenberry*, of counsel), for appellants.

Belmont Waples (*M. M. Riley* and *Charles R. Holden*, of counsel), for appellees.

GRANT, J. (*after stating the facts*). 1. Mr. Stubbings was the owner of the property, the subject of the contract of sale. That contract expressly provided that the title should remain in him until the purchase price was paid, and that the lumber should not be removed from the place of manufacture until that price was paid. The books do not furnish a clearer case of conditional sale. We might cite many authorities from this and other courts, but the late case of *Bunday* v. *Machine Co.*, 143 Mich. 10 (5 L. R. A. [N. S.] 475), is sufficient. Plain-

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tiffs' contract with Hoxie & Mellor expressly stated that Hoxie & Mellor's sole title was derived from, and evidenced by, a contract between Stubbings and Hutchinson and assigned by Hutchinson to Hoxie & Mellor. No other notice of the terms of that contract was necessary. *Town* v. *Gensch*, 101 Wis. 445; *Dwight* v. *Tyler*, 49 Mich. 614. Plaintiffs took no steps to ascertain what that title was until Hoxie & Mellor had failed. Evidently they did not deem it essential for their interests to do so, as they regarded Hoxie & Mellor entirely responsible. Mr. Stubbings took prompt steps to assert his rights. His right of recovery can only be defeated by a waiver on which the plaintiffs acted to their injury. This waiver depended mainly upon the testimony of one of the plaintiffs and Mr. Stubbings. The jury have settled that disputed question of fact in favor of the defendants. The Union Trust Company is the assignee of Mr. Stubbings, and the court very properly instructed the jury that the other defendants were nominal defendants, and that their verdict, if for defendants, would be in favor of Stubbings' assignee, the Union Trust Company. There was no question of fact to be left to the jury upon this point. If any other parties have interests in the estate of Mr. Stubbings, this suit is not the proper proceeding in which to assert them. The other errors assigned relate to the admission and rejection of testimony.

2. Plaintiffs offered in evidence the record of the proceedings had in the circuit court for Langlade county, Wis., in the matter of the assignment of Hoxie & Mellor, assignors, Lyman E. Brown, assignee. That record consisted of a petition filed by Mr. Stubbings asking that the assignee of Hoxie & Mellor be directed to pay him the value of the lumber which was manufactured at the Antigo mill, taken possession of and disposed of by the assignee, an amended petition, answers of the different parties interested, testimony taken by the referee, and the final orders or decrees of settlement. That claim was finally settled by stipulation for $12,000, paid by the Wis-

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consin assignee to the assignee of Mr. Stubbings, and $2,000 to Mr. Stubbings for expenses, etc. These proceedings were at first admitted in evidence, but, on motion of defendants, were finally stricken from the record and excluded from the consideration of the jury. The claim is that that settlement settled all Mr. Stubbings' claims for this lumber, as well that in Michigan as that in Wisconsin. That settlement was ratified by the court, and was declared in the order "to be in full satisfaction, payment, and discharge of any and all liability of or claim against the estate of said assignee thereof by or in favor of the plaintiff, Wilson H. Stubbings, or any person or persons, corporation or corporations, claiming through or under him, and said assignee shall take proper receipts therefor." The money was paid, the proper receipts given, and the plaintiffs in this case credited with it by the direction of the court below at the request of the plaintiffs.

The assignee of Hoxie & Mellor in Wisconsin had no interest in, or control over, the lumber in Michigan. That was in the exclusive control of Mr. Stubbings until it was replevined by the plaintiffs. The decree or order in Wisconsin related solely to the lumber situated at Antigo. The claim is that there was an understanding that Mr. Stubbings should prosecute the Appleton suit until he had exhausted his remedy against the lumber in Wisconsin, and that the plaintiffs should furnish the money to conduct that litigation, and that a settlement was made without notifying them. It is, perhaps, a sufficient answer to plaintiffs' contention to say that there is no showing that a continuance of that expensive litigation would have resulted in a larger amount than was received. However that may be, it is apparent that this Wisconsin litigation was carried on mainly in the interest of the plaintiffs. We think it also evident that their attorneys had cognizance of the proceedings in the Wisconsin court. But, whether they had any knowledge of the proposed action of the court, it is certain that upon ascertaining it they took no direct steps to have the order vacated, which

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they might have done, as they were the principal parties interested. Instead, they seek by a technicality to impose the entire loss upon Mr. Stubbings and his assignee. Mr. Stubbings had shown no intention to abandon his title to the property in Michigan. He and his assignee acted in good faith in instituting and in settling the suit brought in Wisconsin. That settlement was ratified by the court. We are therefore of the opinion that the settlement of the Wisconsin suit did not settle the suit in Michigan, and did not operate to convey the title to the Michigan lumber to the plaintiffs. It would unnecessarily lengthen this opinion to enter into a detailed statement of the facts in regard to the Wisconsin litigation, which covers more than 100 pages of the record. We think the proceedings in that suit were properly excluded from the consideration of the jury.

The other questions raised during the progress of the trial are not of sufficient importance to discuss. We find no reversible error in the rulings of the court.

This was a long and hotly-contested litigation. The case was carefully tried, and was fairly submitted to the jury without any substantial error during the entire trial, and the judgment is affirmed.

BLAIR, MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

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CITY OF FLINT *v.* STOCKDALE'S ESTATE.

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1. MUNICIPAL CORPORATIONS—OFFICERS — COUNCIL — DELEGATION OF AUTHORITY—MINISTERIAL ACTS—APPEAL BONDS.
   The signing of a claim of appeal and an appeal bond in a suit in which a city is interested are ministerial acts which are properly delegated by the council of the city to the mayor.
2. SAME—MAYOR—ATTORNEY—AUTHORITY—APPEAL.
   A resolution of the council of a city directing the mayor and clerk to enter into a contract with a named attorney employing him to take charge of certain litigation in conjunction with its committee is a sufficient delegation of power to the mayor and the attorney to authorize them to take an appeal in the litigation referred to.
3. SAME—APPEAL—BY WHOM TAKEN.
   The mayor of a city is the proper party to sign a claim of appeal from probate court on behalf of the city.
4. SAME—RATIFICATION.
   The act of the common council of a city in ratifying the act of the mayor in taking an appeal and signing an appeal bond on behalf of the city, if not necessary, is within its power and disposes of any objection that may be raised as to the authority of the mayor.

Error to Genesee; Wisner, J. Submitted April 9, 1907. (Docket No. 37.) Decided July 13, 1907.

The city of Flint petitioned for the probate of a lost will, claimed to be the last will and testament of Mary Stockdale, deceased. The petition was dismissed in the probate court, and petitioner appealed to the circuit court. There was an order dismissing the appeal, and petitioner brings error. Reversed, the appeal reinstated, and cause remanded.

DeVere Hall (*Homer J. McBride*, of counsel), for appellant.

Brennan & Cook, *John J. Carton*, *Mark W. Stevens*, *Black & Roberts*, and *Brown & Farley*, for appellees.

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MCALVAY, C. J. The city of Flint, appellant in this case, appealed to the circuit court of Genesee county from an order of the probate court for said county dismissing its petition for the probate of a lost will of Mary Stockdale, deceased. On September 4, 1906, two motions having been theretofore made on behalf of the special administrators and certain parties interested in said estate to dismiss said appeal, the circuit court made an order granting said motions. On September 18, 1906, appellant made a motion to set aside said orders and to reinstate the appeal. This motion was denied. By writ of error the case is brought to this court upon the record.

The grounds upon which the motions to dismiss were based, briefly stated, were that no lawful appeal had been taken from the probate court, because no authority had been given by the city council to take such appeal and execute the appeal bond. This was the view entertained by the trial judge in granting the motions and dismissing the appeal. The petition to probate the will was made and filed by David D. Aitkin, then mayor of the city of Flint, claiming for said city as residuary legatee and trustee for the establishment of a hospital a large interest in said estate. Pending said petition, and before the hearing thereon, the common council of appellant, on April 16, 1906, at a regular meeting, by a unanimous vote, directed its mayor and clerk to enter into an agreement with DeVere Hall as its attorney to take charge of litigation then pending relative to the claim of the city as residuary legatee in trust of the estate of Mary Stockdale. This agreement was on that date executed by these officers on behalf of the city. It provides:

"Whereas the said party of the first part (the city of Flint) has, or believes that it has, rights and interests under a certain last will and testament made by Mary Stockdale, deceased, late of the township of Flint, Genesee county, in said State, under which the said party of the first part is the residuary legatee in trust of the estate of said Mary Stockdale, and litigation concerning which is now pending, and it is the desire of the party of the

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first part to employ professionally the party of the second part (said Hall) to take charge of such litigation, it is hereby agreed: *First.* That the party of the second part shall take full and complete charge of such litigation and in conjunction with the common council of the party of the first part, or such committee or committees as may from time to time be designated by resolution, co-operate in the carrying on of such litigation. *Second.* That the party of the first part, if necessary, shall from time to time, as necessary, pay to the party of the second part in disbursements, the actual expenses of securing witnesses, taking testimony, court officers' charges, not exceeding in the aggregate eight hundred dollars in connection with such litigation."

The record of the same meeting of the council recites:

"Mayor McKinley appointed Ald. Page, Salisbury and Callahan to act with Attorney Hall in connection with the matter of the Stockdale estate."

After the probate court dismissed the petition on May 9, 1906, and within the statutory time, to wit, on June 28, 1906, the mayor filed the claim of appeal on the part of appellant, together with an appeal bond executed by him on behalf of the city, and in due course the appeal was filed and entered in the circuit court. No other action relative to this matter was taken by the common council after April 16, 1906, until August 20th following, when at a regular meeting the action of the mayor in taking the appeal and executing the bond on the part of the city was expressly ratified and confirmed. The fact that the council had paid the costs of appeal was called to the attention of the trial judge before the decision of the motions to dismiss as appears from the record and the opinion of the court. The resolution of ratification was presented to him with the motion to set aside the orders dismissing the appeal.

There is no dispute but that proper action was taken by the municipality at the time it was determined to litigate this matter, nor that appellant had the right so to do, as well as to employ an attorney to take charge of the litiga-

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tion. The record of the council meeting referred to shows that at the time Mr. Hall was employed as attorney a committee was appointed by the mayor to act with him "in connection with the matter of the Stockdale estate." Such action was contemplated by the agreement. These parties were "to co-operate in the carrying on of such litigation." Taking an appeal is one of the usual and ordinary things in litigation, and the authority given to the attorney and committee to co-operate in this case was sufficient to warrant taking this appeal, and the act of the mayor, who was the proper party to sign the claim of appeal, was a ministerial act, as was also his act in signing the bond. Such acts could be and were delegated by the council. It could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents. *Hitchcock* v. *Galveston*, 96 U. S. 341. The acts of the mayor were certainly within the purview of the terms of the agreement of the city made with the attorney, and its action in appointing the committee to co-operate with him, and were germane to the subject-matter of such action. This action of the mayor was afterwards ratified and confirmed by the council. This, while not necessary, was within the power of the council, and would forever dispose of any objection that might be raised as to the authority of the mayor. *Davis* v. *Mayor, etc., of Jackson*, 61 Mich. 530, 540; *Naegely* v. *City of Saginaw*, 101 Mich. 532; *Raymond* v. *McKenna*, 147 Mich. 35. The court was in error in dismissing the appeal.

The judgment of dismissal is hereby reversed and set aside, and the said appeal reinstated, and the cause is remanded for further proceedings, with costs to appellant to be taxed and paid by the special administrators out of the estate of Mary Stockdale.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

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RAPP *v.* RAPP.

1. DIVORCE—GROUNDS—DRUNKENNESS.
   That a wife was occasionally under the influence of intoxicants does not constitute habitual drunkenness giving her husband ground for a divorce.[1]

2. SAME—EXTREME CRUELTY—EVIDENCE.
   On a bill for divorce, evidence examined, and *held*, that the charge against the wife of extreme cruelty was not sustained.

Appeal from Wayne; Hosmer, J. Submitted April 11, 1907. (Docket No. 64.) Decided July 13, 1907.

Bill by Frederick Rapp against Christine Rapp for a divorce. From a decree for complainant, defendant appeals. Reversed, and bill dismissed.

Washington I. Robinson, for complainant.

William Look, for defendant.

MCALVAY, C. J. From a decree granting a divorce on the ground of habitual drunkenness and extreme cruelty, defendant has appealed, contending that the decree is not supported by the evidence.

There is no question of law in the case. These parties had been married about six years. For a time complainant kept a saloon, and required his wife to tend bar. The witnesses he produces to prove his charge of habitual drunkenness appear to either have been engaged in like business or to be regular customers at such places. Outside of complainant's testimony the evidence at most indicates that defendant was occasionally under the influence of intoxicants. This is not habitual drunkenness. *Meathe* v.

[1] As to the degree of drunkenness which will authorize a divorce, see note to *Dennis* v. *Dennis* (Conn.), 34 L. R. A. 449.

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Meathe, 83 Mich. 150. Complainant brought beer and sometimes liquor to the house, and both parties used it as they desired. This court in *Magahay* v. *Magahay*, 35 Mich. 210, gave a definition of what constitutes an habitual drunkard. The weight of evidence in this case does not bring defendant within that definition. It is not disputed but that this woman a few years ago suffered from paralysis, and from the testimony it appears that such physical disability might be mistaken for intoxication.

The extreme cruelty charged is that defendant used vile and abusive language, that she absolutely neglected her household duties, and spent the money for liquor which was supplied by complainant for household expenses, and contracted bills at stores. It is uncontradicted, except by complainant, that she was a competent and neat housekeeper. She was industrious and at times did washing for many people. No vile and abusive language used by her is proven except by complainant, who admits that he called his wife vile names. She satisfactorily explains how the money which was given to her was used and why goods were charged. The charge of extreme cruelty is not sustained.

From an examination of the entire record, our conclusion is that the weight of all the evidence in the case does not support the decree. The decree is reversed, and complainant's bill dismissed, with costs of both courts.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

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HANNAH & HOGG *v.* RICHTER BREWING CO.

FRAUDULENT CONVEYANCES—SALES IN BULK—WHAT CONSTITUTE —CHATTEL MORTGAGE.

The giving of a chattel mortgage upon a stock of goods is not a sale, transfer, or assignment in bulk within the meaning of the sales in bulk act, so called (Act No. 223, Pub. Acts 1905), a chattel mortgage being neither a sale nor an assignment in this State.[1]

Appeal from Delta; Stone J. Submitted April 12, 1907. (Docket No. 80.) Decided July 13, 1907.

Bill by Hannah & Hogg against the Richter Brewing Company and others to set aside certain conveyances on the ground of fraud. From an order sustaining a demurrer of defendant Richter Brewing Company, complainant appeals. Affirmed.

A. H. Ryall, for complainant.

Cummiskey & Spencer, for defendant brewing company.

MCALVAY, C. J. But one question is involved in this appeal, and that is whether the giving of a chattel mortgage is a sale, transfer, or assignment, in bulk, within the meaning of Act No. 223, Pub. Acts 1905, entitled "An act to regulate the sales, transfers and assignments of stocks of goods, merchandise and fixtures, in bulk." Defendant Oliver Hotel Company, in connection with its business, conducted a bar where liquors were sold. On February 21, 1906, it gave defendant Richter Brewing Company a chattel mortgage upon the entire bar fixtures pertaining to its liquor business, and afterwards made a sale in bulk of the same property to the other defendants.

[1] As to the validity and construction of statutory requirements on sale of stock of goods in bulk, see note to *Everett Produce Co.* v. *Smith* (Wash.), 2 L. R. A. (N. S.) 331.

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The hotel company was, before giving this chattel mortgage, indebted to complainant, which, on May 29, 1906, put its claim into judgment for $273 damages and $2.95 costs of suit. On June 5, 1906, an execution issued and a levy was made upon this property, and demand was made of defendants to turn the same over to complainant and release all claim of ownership or title thereto. This demand was refused, and the bill of complaint in this case was filed, upon the theory that the disposition of this property was within the prohibition of the statute invoked, and complainant asked the court to declare the instruments void for that reason, and prayed for other relief. Defendant Richter Brewing Company demurred, raising the question involved. The demurrer was sustained, and a decree entered dismissing the bill of complaint as to demurring defendant.

So much of this statute as is now necessary to quote provides: "The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the business of the seller, transferror or assignor, shall be void as against the creditors of the seller, transferror, assignor, unless," etc., giving the notice and proceedings necessary in order to make the transaction valid. While many of the courts hold to the common-law doctrine that a chattel mortgage is an instrument of sale conveying the title of the property, this court has held that the true relation of parties to a chattel mortgage is that of debtor on one side and creditor secured by lien on the other. *Lucking* v. *Wesson*, 25 Mich. 443. And also that the title of a mortgagee of chattels does not become absolute until foreclosure and sale. *Kohl* v. *Lynn*, 34 Mich. 360, and cases cited. It is the settled law of this State that a chattel mortgage is not an assignment. *Sheldon* v. *Mann*, 85 Mich. 265; *Warner* v. *Littlefield*, 89 Mich. 329; *Wineman* v. *Manufacturing Co.*, 118 Mich. 636. To

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find the legislative intent in construing a statute it is proper for the court to consider the entire statute, the ordinary meaning of the words used, the object of the legislation, and the status of the law of the State in relation to the subject-matter under discussion. The terms, "sale, transfer or assignment," used in the entitling and in the body of the act, taken in their usual and ordinary signification, mean the disposition of the entire title of the seller. This meaning is indicated by the provision in the statute relative to notice required to be given to creditors as follows, "and unless the purchaser, transferee and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed *sale* and of the price, terms and conditions thereof." Taking this language and the other language of the act, it is apparent that its object was to regulate those sales made of an entire stock upon an immediate payment and change of possession, and which before the act might have been valid, although in fact a fraud upon creditors. To hold a chattel mortgage within the meaning of the statute it is necessary to hold that it is a *sale* within the common acceptation of that term, transferring the entire title, and entitling the vendee to immediate possession. This, by the specific terms of this mortgage, which are the same as those of chattel mortgages generally in this State, and under our decisions above cited, cannot be done. The argument is advanced that, having adopted this statute, the court will follow the construction given by the courts of those States from which it is taken. The custom referred to has no binding force upon the courts of the adopting State. In the case at bar the custom cannot be followed, for the reason that no construction has yet been given upon the point involved, and, if construction had been given favorable to complainant, it could not be followed because those States accept the common-law doctrine that

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a chattel mortgage is an instrument of sale conveying the title of the property, which, as above shown, does not prevail in this State.

It is also urged that the court must hold chattel mortgages within the meaning of the act in order to remedy the mischief sought to be cured. While it is true that the act is intended to prevent certain debtors from defrauding their creditors, it is not for the courts to give the statute a construction it will not bear, because the legislature has not included within its prohibition certain transactions whereby frauds may be and undoubtedly are perpetrated. That is a matter for the consideration of the legislative branch of the government.

We agree with the learned circuit judge that chattel mortgages are not included in the act.

The decree is affirmed, with costs.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

HERTEL v. SAFETY FOLDING BED CO.[1]

1. MASTER AND SERVANT — DANGEROUS APPLIANCES — DUTY TO GUARD — VIOLATION OF STATUTE.

   There is no violation of the statutory duty on the part of an employer in failing to guard a revolving line shaft situated two feet from the floor of a factory at a point where there are no couplings, set screws, or projections of any kind.

2. SAME — PERSONAL INJURIES — RISKS ASSUMED — SCOPE OF EMPLOYMENT.

   In an action by a servant for personal injuries caused by being

[1] Rehearing denied October 4, 1907.

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caught on a revolving shaft, evidence examined, and *held*, that sawing crating material was within the scope of employment of an employé of the shipping department of a factory, and that the risk of being caught on the shaft from which the saw was driven was apparent and was assumed by him.

Error to Wayne; Murphy, J. Submitted April 12, 1907. (Docket No. 73.) Decided July 13, 1907.

Case by William Hertel, by next friend, against the Safety Folding Bed Company, Limited, for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Keena, Lightner & Oxtoby, for appellant.

E. A. Fink, for appellee.

MCALVAY, C. J. While in defendant's employ, on November 16, 1904, plaintiff, then about 18 years of age, was injured. James Saxton was shipping clerk, and had charge of the crating and shipping department of defendant's factory, which included cutting the boards which were used in making crates. Plaintiff was employed by Saxton and worked in his department a year and three months before the accident. The saw on which the boards for crating were cut was located in a different part of the building from the shipping room where the goods were crated. This saw and saw table were located upon a floor or platform which had been put in about halfway between the floor and ceiling of this part of the factory. The saw was driven by a line shaft, which was continually revolving when the engine was running. It was about two feet from the floor upon which the saw table stood, and extended the width of the building north and south. The accident occurred about four feet from the saw table. This saw was operated by two persons. One put the boards through the saw, and the other, a helper, took the pieces into which a board was sawed away from the table and piled them up. The saw was in use about half the

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time, sometimes continuously for a full day, and sometimes for half a day, as the strips for crating were needed. The person doing the sawing stood on the west side of the shafting facing the windows, which were in the east wall of the building. The helper was on the east side of the shafting at the east end of the saw table. This was part of the work of the shipping and packing department, and was all done by the employés of that department, under the direction of the shipping clerk, who hired, controlled, and discharged the men under him. Plaintiff during the time he worked for defendant company had been frequently sent by Mr. Saxton to work as helper at the saw table. The saw at this time was operated by Julius Diweneski, an employé in the same department, 24 years of age. Plaintiff had so worked for some length of time previous to the accident; he says for two or three months. After Diweneski quit work, Mr. Saxton put plaintiff in charge of this saw, at which work he continued until his injury. The record is not perfectly clear as to the length of time he operated the saw. It was at least for two weeks. Plaintiff says:

"I had been there working at the saw myself five or six times. * * * It was not on consecutive days. Sometimes I would be there once a week, and sometimes twice a week, and maybe once in two weeks."

On the day of the accident, while ripping boards with a helper, who had never worked there before that day, plaintiff, desiring to give him some instructions how to pile the pieces of lumber, stepped away from the saw table, about four feet, towards this line shaft and against it. He says that he went away from the saws on account of the noise, so that the helper could hear him. His clothes were in some way caught by the revolving shaft, and he was injured. At this place on the shaft there was no coupling, set screw, or other projection of any kind. The case was submitted to the jury, and a verdict rendered for plaintiff. Defendant asks this court to reverse the

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judgment entered upon said verdict, upon the ground that the trial judge erred in submitting the case to the jury. The contention is that plaintiff assumed the risk connected with his employment, that there was no evidence of defendant's negligence, and that plaintiff was guilty of contributory negligence.

The learned trial judge properly held that defendant could not be held guilty of negligence on account of any violation of a statutory duty in the construction and operation of this machinery. He submitted the question to the jury to determine whether the work in which plaintiff was engaged at the time of his injury was within the scope of his regular employment, and subject to increased risk and danger concerning which he was not informed and instructed. We think that the crucial question in this case is whether this work was within the scope of plaintiff's regular employment. There is no dispute in the record but that the work done upon this saw was part of the work of the department in which plaintiff was employed; that plaintiff, as a helper, had frequently and for a considerable length of time assisted in this part of the work under a competent operator; that he was put in charge of the saw and did this work for at least two weeks before his injury. He was a young man of ordinary intelligence almost 18 years old. From his acquaintance with this revolving shaft and his experience in going over and under it frequently when he worked as helper, he must be held to have known the dangers incident to coming in contact with it. He says he knew that it was always in motion, and that he avoided touching it. The question of negligence on account of not giving warning as to dangers from the saw itself is not in the case. From the experience of the plaintiff, above related, while working as a helper and operator, he was informed of all the apparent risks of his surroundings. *Mushinski* v. *Vincent*, 135 Mich. 26; *Berlin* v. *Mershon & Co.*, 132 Mich. 183.

The work in which he was engaged, and which he al-

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ways performed satisfactorily, was within the scope of his employment. The danger from this shaft was apparent, and the risks of the employment were assumed by him. *Kean* v. *Rolling Mills*, 66 Mich., at page 288; *Martin* v. *Lumber Co.*, 141 Mich. 363.

The request of the defendant for an instructed verdict in its favor should have been given. Other contentions of defendant need not be considered.

The judgment is reversed, and a new trial ordered.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

HORTON v. HELMHOLTZ.

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1. TAXATION—SALE FOR TAXES—PURCHASE BY STATE—EFFECT.
   A valid sale to the State for taxes divests the original owner of all title to the land sold and vests a complete and perfect title in the State.

2. SAME—ORIGINAL TITLE—CONVEYANCE—EFFECT.
   A quitclaim by the original owner of lands previously bid in to the State at a valid tax sale conveys nothing.

3. QUIETING TITLE—RIGHT TO RELIEF.
   One must have either a legal or an equitable title if he is to be allowed relief upon a bill to quiet title, though an equitable title is sufficient. (Section 448, 1 Comp. Laws.)

4. SAME—TAX TITLE—SUFFICIENCY.
   Where a deed of State tax land executed by the auditor general was void because of insufficient payment therefor, and the original owner tendered a sufficient sum to the auditor general and demanded a deed, which was refused him, he acquired a sufficient equitable title to entitle him to relief by a bill to quiet title, though he did not move against the auditor general by mandamus to compel him to issue the deed.

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5. SAME—PARTIES—AUDITOR GENERAL.
The auditor general is a proper party to such a bill.

6. TAXATION—TAX TITLE—VOID DEED—EFFECT ON TITLE.
Where a deed of State tax land executed by the auditor general was void because of insufficient payment therefor, but the holder also holds under other tax sales and deeds made subsequent thereto, the later deeds are not void because of the failure to pay the deficiency on the prior sale, but the title conveyed by the later deeds is valid subject to a reassessment for the deficiency.

Appeal from Cheboygan; Mayne, J., presiding. Submitted April 18, 1907. (Docket No. 58.) Decided July 13, 1907.

Bill by Charles M. Horton against August C. Helmholtz and James B. Bradley, auditor general, to quiet title to certain land. Defendant Helmholtz filed an answer in the nature of a cross-bill to establish a title by virtue of certain tax deeds. From a decree for defendant, complainant appeals. Affirmed.

A. A. Ellis, for complainant.

Frost & Sprague, for defendant Helmholtz.

John E. Bird, Attorney General (*Charles W. McGill* and *George L. Hauser*, of counsel), for defendant Auditor General.

HOOKER, J. The defendant Helmholtz claims title to the land in controversy under various tax titles as follows:

(1) A purchase at delinquent sale in May, 1893, for the tax of 1890, at which time the purchaser bought the State's title, for the years 1883 to 1889, the same having been previously bid in to the State for those years. It is admitted that the State's title was valid.
(2) A purchase at delinquent sale in December, 1893, for the tax of 1891.
(3) A purchase at delinquent sale in December, 1895, for the tax of 1893.

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(4) A purchase at delinquent sale in December, 1896, for the tax of 1894.

(5) A purchase by the State at delinquent sale in May, 1898, for the tax of 1895; this title having been afterwards purchased at the auditor general's office on December 12, 1898, at which time the taxes assessed for 1896 and 1897 were paid by the purchaser.

(6) A purchase at delinquent sale in May, 1902, for the tax of 1899.

The complainant admits that the sales to the State for the taxes of 1883 and succeeding years were valid. It follows, therefore, that the original owner was divested of all title to the lands, and the State became vested with a complete and perfect title as early as 1885. The original title, quitclaimed to complainant, therefore conveyed nothing. One of two things is necessarily deducible from these facts, viz., either the defendant's grantor became vested with a complete and perfect title, or the deed from the State was void, in which case such a title remained in the State, and was subject to purchase from the auditor general, as in other cases. The complainant asserts the latter claim, and in 1904 he tendered to the auditor general a sum sufficient to cover the State's claim, interest, and charges, and requested a conveyance, which was refused him. Thereupon he filed this bill without attempting to enforce by mandamus compliance with his demand whereby he might perhaps have obtained the title from the State, if, as he claims, the State then had the title, and he was entitled to a deed. The bill in this cause is filed against Helmholtz to quiet complainant's title by setting aside and canceling as void the tax deeds as clouds upon complainant's title. The auditor general is made a party defendant, though the bill contains no specific prayer against him.

We consider it elementary that one must have a legal or equitable title, if he is to be allowed relief upon a bill to quiet title. Under our statute one claiming only an equitable title may file such a bill. 1 Comp. Laws, § 448. We have held that the act of the auditor general in sell-

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ing and issuing deeds for State tax lands on private sale is ministerial. Chief Justice GRANT said in *Eldridge* v. *Richmond*, 120 Mich. 588:

"The application was made by James H. McFarlan, who subsequently assigned to plaintiff. We think it conclusively appears that application and payment were made on August 3d. This was all that was necessary to complete the purchase. It is urged that the minds of the applicant and the auditor general did not meet until the latter had investigated and determined whether the land was subject to sale. The mind of the auditor general is of no consequence. He is not clothed with any discretion. His act is purely ministerial. The deposit with him of the amount due and the application complied with the law, and rendered the purchase complete. The subsequent acts of issuing a certificate, or executing a deed, or both, are mere ministerial acts necessary to evidence title. The title which the State has becomes absolute by application and payment."

See, also, *Youngs* v. *Povey*, 127 Mich. 299; *Hall* v. *Mann*, 122 Mich. 15; *Cockburn* v. *Auditor General*, 120 Mich. 644.

If, as contended, the deed first issued was void, and the complainant took steps which entitled him to a deed, we think it must follow under the cases cited that he acquired some sort of an equitable title, and that he might have it quieted in such a proceeding as this. We also think that it was competent to make the auditor general a party, and ask that he be required to execute and deliver the deed to which complainant should show that he was entitled. This, however, leaves out of consideration the changed conditions arising out of later sales.

The State's title for the taxes of 1883 to 1889 was sold in 1893 by the county treasurer. It is claimed that the sale and deed were void, *first*, because interest on the tax was computed at 6 per cent. instead of 12; *second*, because the purchaser did not pay the taxes for 1891 and 1892. Counsel insist that, if right in the proposition that the deed was void for the reasons given, there was a lien for the unpaid interest of $22.31, and that, while the

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land might be assessed, returned, and sold for a later tax, such sale would be void if the purchase was not accompanied by the discharge of the existing lien, which lien was never suspended; it being plainly ascertainable from the record, unlike the case of *O'Connor* v. *Auditor General*, 127 Mich. 553, where all sums claimed or due the State had been paid, leaving nothing due to the State for which it could have a lien, until the amount received from Keith on his purchase of the State's title should be refunded. We are of the opinion that this distinction is not warranted by the facts. It is undeniable that according to complainant's contention there was a deficiency of $22.31 on the purchase of the State's title in this case, and that the sale of the auditor general and his deed were void. If that were all that there was of the defense, he would be entitled to have his title quieted.

But defendant holds under later titles procured after said purchase, and while the State's title was apparently held by defendant or his grantors, unquestioned, under the deed. In the *O'Connor Case* the facts were similar. It is true that the deed in that case was canceled on another ground, viz., an error in publication; but it does not follow that it was not on the ground, also, that it was void for want of full payment as in this case, or that it was not claimed that the State had a lien upon the premises for the identical reason claimed in this case, which might have authorized a seasonable purchase by another. In fact, the opinion expressly states that "the deed was void for the further reason that when Keith purchased the tax of 1896 was a lien, and was not paid by him." The relator moved for a cancellation and refunding to him of the purchase money, basing his claim upon the contention that when Keith purchased for the tax of 1896 his purchase and deed were void, because of his failure to pay the deficiency on the prior sale. The contention was not sustained, and it was indicated that the title thus conveyed was a valid title, but was taken subject to a reassessment for the deficiency, upon the ground that, section

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73, Act No. 262, Pub. Acts 1899, should be construed as providing for a suspension of the lien of the State for the deficiency. See, also, *Auditor General* v. *Clifford*, 143 Mich. 628.

We need not consider other questions in the case, and express no opinion upon them. The decree is affirmed, with costs.

MCALVAY, C. J., and MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

NEIFERT *v.* HASLEY.

PHYSICIANS AND SURGEONS—MALPRACTICE—EVIDENCE.

In an action against a surgeon for malpractice, evidence examined, and *held*, that there was none warranting the inference that plaintiff's disabled arm or crippled foot resulted from improper surgical treatment.[1]

Error to Wayne; Donovan, J. Submitted June 4, 1907. (Docket No. 7.) Decided July 13, 1907.

Case by Albert Neifert against Philip F. Hasley, a surgeon, for malpractice. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

James H. Pound (*Charles H. Marr*, of counsel), for appellant.

Charles M. Woodruff, for appellee.

[1] As to degree of care and skill which a physician or surgeon must exercise, see note to *Whitesell* v. *Hill* (Iowa), 87 L. R. A. 830.

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OSTRANDER, J. Plaintiff, a man 30 years old, was badly injured in May, 1903, by machinery. According to his testimony, his right arm was broken in three places between the shoulder and elbow, some ribs were broken, his leg was broken just below the knee, he was badly hurt about the head, and a portion of his skull was gone. Defendant, a physician and surgeon, attended him until some time in the summer, and, as plaintiff claims, was negligent and unskillful in his treatment. The declaration alleges, as improper treatment, permitting and causing the broken brones not to be placed in apposition the one to the other, the muscles, ligaments, and tendons not to be properly placed, so that they could properly adhere to their proper places by natural processes, the leg and foot caused to be and become greatly swollen, inflamed, festered, and diseased, pus permitted to accumulate and remain, so that it became and was necessary to amputate a portion of the foot. The result is alleged to be a weak, stiff, deformed arm, a crippled leg and foot. The case coming on to be tried, the court, when plaintiff's case was rested, directed a verdict for defendant. This ruling and direction is assigned as error. We are therefore called upon to review the testimony produced for plaintiff.

Counsel for appellant has directed attention to that portion of it which, he thinks, made a case for the jury. He relies upon evidence of the fact that the arm was not set until 19 days after the injury, the opinion of plaintiff that there was no reason for not setting it earlier, the statement of Dr. Reig that an arm should be set as soon as possible, if everything is in condition to do it, mentioning as a preventable condition an arm too badly bruised, the opinion of plaintiff that the arm "is not properly set." He relies, also, upon the testimony of plaintiff, to the effect that Dr. Parker said to defendant, after learning that the arm was not set: "What do you expect to get out of that? You will have a flail arm out of it." He relies, also, upon the fact that Dr. Parker advised application of heat to the leg; the argument made being that defend-

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ant did not use a well-known remedy, and neglected to apply hot water to stimulate the circulation until told to do so by Dr. Parker. There is also the testimony concerning the amputation of the toes and of the condition of plaintiff at the time of the trial. The witnesses for plaintiff were himself, his wife, and Dr. J. H. Reig. It appears that on the day succeeding the injury, when plaintiff's leg was dressed and set, two physicians besides defendant were present. Later Dr. Parker was in consultation with defendant. When the toes were amputated, Dr. Stevens performed the operation, and Drs. Reig, Pike, and another physician were present. From Dr. Reig we get no testimony concerning the nature or extent of plaintiff's injuries, the treatment he had received, whether the treatment had been proper, the cause or causes of plaintiff's condition at the time he began treating him. His testimony warrants the conclusion that he found the tissue on and about the toes broken down and amputation of the toes necessary. In his opinion plaintiff had dry gangrene, which, he said, may be due to a bruise or to interference with circulation of the blood. Plaintiff's injuries were severe and evidently complicated. Defendant advised amputation of the leg. Dr. Parker, called in consultation, was of opinion that plaintiff had a fighting chance to save the leg. The chance was taken, with the result already stated. The argument that the court or a jury may assume that hot water applications to the leg were so strongly indicated that it was negligence not to apply them is met by the argument of counsel for defendant that hot applications were clearly contra indicated as likely to induce suppuration, and that the purpose of applying them when they were applied was to hasten the sloughing off of dead tissue and to establish a line of demarcation between good and bad tissue. There is no opinion evidence upon the subject. When defendant set the arm (it had been before that stretched out between sand bags), a hole was left in the plaster cast so that a sore might be reached and treated, indicating a

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bruised arm. It is not claimed that plaintiff has a flail arm.

If in any case nonexpert testimony of the injury, of the method of treatment adopted, and of the resulting conditions may be such evidence of negligent treatment by an attending surgeon as a jury may act upon (see *Wood* v. *Barker*, 49 Mich. 295; *Pelky* v. *Palmer*, 109 Mich. 561), this case is not such an one. And we have found, and our attention has been directed to, no testimony warranting the inference that the disabled arm or the crippled foot resulted from improper surgical treatment.

The judgment is affirmed.

CARPENTER, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

RHOADES v. MALTA VITA PURE FOOD CO.

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1. CONTRACTS — CONSIDERATION — ILLEGALITY — PUBLIC POLICY — PREVENTION OF COMPETITION — FRAUD.

   A contract of employment, entered into for the primary purpose of inducing the employé to break a similar contract with another employer and deprive it, as a competitor, of the benefit of the skill and experience of the employé, is illegal and fraudulent and does not furnish a good consideration for a promise.

2. PARTNERSHIP — LIMITED PARTNERSHIPS — CONTRACTS — EXECUTION — SUFFICIENCY — TWO MANAGERS.

   A contract by a limited partnership association to employ plaintiff for two years at a salary of $2,000 per year is void if not reduced to writing and signed by at least two managers, as provided by section 6083, 2 Comp. Laws.

3. PLEADING — ISSUES — BILL OF PARTICULARS — SERVICES.

   Where, in an action against a corporation, the bill of particulars

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claims compensation for services rendered beginning with a certain time, evidence is not admissible which shows a subsequent contract to pay plaintiff for services previously rendered to defendant's predecessor in the business.

4. CORPORATIONS—OFFICERS—AUTHORITY—DELEGATION.
Authority to the secretary and treasurer of a corporation to contract to pay for services rendered to another, for which defendant corporation was in no way liable, does not authorize the officer to delegate such authority to another.

5. SAME—AUTHORITY DELEGATED.
A delegation of authority to employ plaintiff for a corporation, and fix his salary, does not authorize making a contract by which the corporation becomes liable to pay him for services previously rendered for the corporation's predecessor in business.

Error to Calhoun; Hopkins, J. Submitted June 4, 1907. (Docket No. 12.) Decided July 13, 1907.

Assumpsit by Charles E. Rhoades against the Malta Vita Pure Food Company for work and labor. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Williams & Beck, for appellant.

Moore & Moore (*R. J. Kelley*, of counsel), for appellee.

BLAIR, J. Plaintiff, an expert in the manufacture of cereal flake foods and a millwright, brought suit against defendant for a balance of salary claimed to be due him, filing, with his declaration on the common counts, a bill of particulars of his claim. The charges against defendant in the bill of particulars are:

To two years' salary from Sept. 16, 1901, to Sept. 16, 1903, at $2,000.00 per year	$4,000 00
To materials furnished and provided by the plaintiff for the defendant in doing experimental work by the plaintiff for the defendant at its request, as follows: [Stating various items, amounting in the aggregate to]	89 59

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Defendant is credited with payments of cash, from time to time, amounting to $2,850, leaving a balance claimed to be due the plaintiff of $1,189.59. The defendant is a New Jersey corporation, formally organized under the laws of that State, February 4, 1902. On January 24, 1902, the defendant acquired the property and plant of the Battle Creek Pure Food Company, Limited, a partnership association. Plaintiff entered the employ of the Pure Food Company in the fall of 1900, but left it in May, 1901, to take a position with a company at Buffalo, N. Y., manufacturing a food known as "Force," at a salary of $2,000 per year for one year from May 22, 1901. In August, 1901, plaintiff, in violation of his contract with the Force Food Company, agreed with Mr. A. C. Wisner, a manager of the Battle Creek Pure Food Company and acting for said company, to abandon his contract with the Force Food Company, return to Battle Creek, and enter the employ of the Pure Food Company at a salary of $2,000 per year on a two-years contract. According to plaintiff's proofs, it was understood by him and Mr. Wisner that the primary reason for the agreement between plaintiff and the Pure Food Company was to get the plaintiff out of the employ of the Force Food Company and thereby deprive that company, as a competitor of the Pure Food Company, of the benefit of his skill and experience in installing the machinery in their plant and manufacturing their product. The agreement was to be kept secret, and plaintiff was not to be openly in the employ of the Pure Food Company, but, "as a cover," was to be ostensibly in the employ of others. The object was to "put Force out of business; and he says: 'That is our intention; we have the money back of it, and we will do it.'"

"*Q.* And your coming back to Battle Creek was dishonest?

"*A.* Well, it was not dishonest on my part.

"*Q.* But it was dishonest on his part, and you were willing to aid him in a dishonest purpose on his part?

"*A.* I did aid him.

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"*Q.* And you knew that he had a dishonest purpose in getting you back there?

"*A.* Practically so; yes, sir.

"*Q.* Now, will you kindly tell us what his dishonest purpose was?

"*A.* What his dishonest purpose was?

"*Q.* Yes, sir.

"*A.* Well, his dishonest purpose was getting me from the Force Food Company for the protection of the Malta Vita.

"*Q.* Then it was dishonest on his part to get you away from the Force Food Company?

"*A.* It seemed so; yes.

"*Q.* And you were quite willing to be used as a dishonest tool in Mr. Wisner's hands?

"*A.* Not particularly so; I wanted to go away.

"*Q.* Mr. Wisner could not have done anything dishonestly if you had said to him, 'Mr. Wisner, I am not a dishonest man, and I will not aid you in your dishonest scheme.' Did you tell him that?

"*A.* No, sir.

"*Q.* And you joined him in his dishonest scheme?

"*A.* I suppose I did.

"*Q.* And enabled him to further a fraud on somebody, did you?

"*A.* Yes, sir."

The agreement between plaintiff and Mr. Wisner was not binding upon the Battle Creek Pure Food Company for the reasons:

First. The transaction was illegal and fraudulent, and did not furnish a good consideration for a promise. *Comstock* v. *Draper*, 1 Mich. 481; *Smith* v. *Barstow*, 2 Doug. (Mich.) 155; *Morgan* v. *Andrews*, 107 Mich. 33, 39; *Angle* v. *Railway Co.*, 151 U. S. 1.

Second. Because the agreement was not reduced to writing and signed by at least two managers, as required by section 6083, 2 Comp. Laws. *Citizens' Savings Bank* v. *Vaughan*, 115 Mich. 156. It follows, therefore, that, even if competent proof had been given or offered tending to show liability on the part of the defendant corporation for the debts of the Battle Creek Pure Food Company, which we do not determine, defendant could not be

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held upon this contract. Plaintiff's counsel contend, however, that if Judge Hopkins ruled correctly in directing a verdict for defendant, upon the ground that defendant was not liable for the services performed under the contract with Wisner, he erred in refusing to permit plaintiff to prove a new contract between plaintiff and defendant made in November, 1903, wherein it was agreed that plaintiff should receive a salary of $2,000 per year and the balance due him from the Battle Creek Pure Food Company as his compensation for the services to be rendered defendant.

Plaintiff's counsel offered to prove, and put appropriate questions to witnesses to elicit such proof, that at the time of plaintiff's employment by Mr. Roleau, defendant's general manager:

"Mr. Roleau told Mr. Rhoades that he was glad that he, Rhoades, would be able to work for them, but that as to his salary he should see Mr. Wisner; that everything in reference to the hiring of Mr. Rhoades was left to Mr. Wisner, and that anything that Mr. Wisner said would go; that thereafter Mr. Rhoades saw Mr. Wisner and made an arrangement with him whereby he was to perform certain further services for the Malta Vita Company at a salary of $2,000 per year, and that as a part of that arrangement Mr. Wisner promised in behalf of the Malta Vita Pure Food Company that the balance due to Mr. Rhoades upon the original two-year arrangement about which Mr. Rhoades has testified in this case and in reference to which he claims a balance of $1,189 should be paid; that is, that the Malta Vita Pure Food Company, in addition to the payment of $2,000 a year, would pay Mr. Rhoades the $1,189 in question, or that balance, in consideration of the then present employment.

"We desire to show further that Mr. Roleau was at that time general manager of the Malta Vita Pure Food Company, the defendant in this case, with ample power to make such an arrangement as I have stated.

"*Mr. Moore:* You have gone so far now, that I think Mr. Roleau's power in this matter should be shown. I do not understand that he had any such power. I do not understand that Mr. Roleau ever had any power to authorize anybody else to employ that Mr. Roleau or some-

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body did employ this man to work for several months after this alleged contract had expired, and that this was the first service he ever performed for the Malta Vita. I object to it.

"*The Court:* The objection may be sustained."

Mr. Roleau testified, reading from the records of the defendant company, as follows:

"I came there September 13, 1902. After May, 1903, I held the office of secretary, and was elected treasurer after Mr. Phelps died. As secretary of the company, I performed the usual duties and the duties of manager. I was made manager at that time—in June, 1903. I read from page 201: 'On motion of Mr. Studebaker, seconded by Mr. Morganthaler, Mr. C. E. Roleau was unanimously elected secretary to fill vacancy then existing.' On page 208: 'On motion of Mr. Cross, seconded by Mr. Morganthaler, it was carried that Mr. Roleau be given charge of the affairs of this company and the conduct of its offices and factories as general manager.' That resolution was put through in the adjourned meeting held June 5, 1903. I acted in accordance with that resolution, and was given charge of the affairs of the company and the conduct of its offices and factories as general manager. I held that office continuously until January 9th, this present year, when the company was dissolved. * * *

"The whole board were principally active as directors in looking after and attending to the affairs of the Malta Vita Pure Food Company during the period of its existence. Of that board, Mr. Phelps, Mr. Wisner, and myself were the members living in Battle Creek. * * * All of the directors of the company except Mr. Wisner and Mr. Phelps, up until I was elected in January, 1904, resided away from the city of Battle Creek."

The proof of a new and independent contract covering this balance of salary was not within the cause of action as limited by the bill of particulars, which claimed compensation for services actually rendered for defendant prior to the making of the contract with Wisner, which plaintiff offered to prove, and the testimony was properly rejected, although the ruling does not seem to have been put upon this ground. The ground upon which the court rested his ruling seems to have been that the authority to

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make the contract could not be delegated by Roleau to Wisner. If Roleau himself had authority to bind the corporation to pay for services performed for another corporation and for which it was in no wise liable, he certainly had no authority to delegate such an extraordinary power to another. Furthermore, the offer to prove does not indicate that Roleau attempted to delegate any such authority, but to authorize Wisner to fix the salary of plaintiff for services to be performed in the future. Such delegation of authority would fall far short of warranting the making of the contract alleged by plaintiff.

The judgment is affirmed.

CARPENTER, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

McCASKEY REGISTER CO. v. TRUETTNER.

1. STATUTE OF FRAUDS — SALES OF GOODS — CONTRACTS WITHIN STATUTE.

   Any essential part of a contract for the sale of goods of the value of over $50 resting in parol renders it void under the statute of frauds.

2. SALES — CONTRACT — ORAL REPRESENTATIONS — MERGER IN WRITING.

   An agent solicited an order for goods of defendant, but defendant declined to buy, stating that if he afterwards concluded to order he would send direct to the principal. Subsequently he sent a telegram to the principal accepting the agent's offer and alluding to a letter to follow, which he sent, containing all the essential terms of a contract. *Held*, that oral representations of the agent, not incorporated in the letter, were not binding on the principal.

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Error to Gogebic; Cooper, J. Submitted June 7, 1907. (Docket No. 48.) Decided July 13, 1907.

Assumpsit by the McCaskey Register Company against Louis H. Truettner for goods sold and delivered. There was judgment for defendant, and plaintiff brings error. Reversed, and judgment entered for plaintiff.

This is an action of assumpsit, tried before the court without a jury. Plaintiff's declaration and claim are based upon the following telegram and letter:

"BESSEMER, MICH. Aug. 30.

"McCASKEY REGISTER CO.,
"Alliance, Ohio:

"Accept offer of your agent for short account system. Letter follows.

"L. H. TRUETTNER."

"BESSEMER, MICH. 9–2–'05.

"McCASKEY REGISTER CO.,
"Alliance, Ohio:

"*Gentlemen:* This letter confirms message sent you 8–30–'05, accepting offer made by your agent for one of your short account systems and cabinet which holds 640 books, price complete $135. You may ship same along at once.

"Yours respectfully,
"L. H. TRUETTNER, H. O."

The machine was shipped, was received, put in operation, claimed to work unsatisfactorily, and reshipped by the defendant to the plaintiff. Plaintiff refused to accept it, claiming an absolute sale and completed contract. With his plea of the general issue defendant gave notice that the contract of sale, if any was made, was oral; that the value of the goods exceeded $50; and that the contract therefore was void under the statute of frauds. One McLeod was the agent of the plaintiff. He on August 24th solicited an order from the defendant. No order was given. McLeod testified that he showed defendant a sample and made a proposition of different sizes at dif-

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ferent prices, one of which was $135; that he also proposed, that if defendant would turn in the system he was then using, he would receive 400 of its pads in exchange, or he could have 5 per cent. off for cash, and that the company, if he sent the order, would guarantee to keep the register in good condition for two years. Defendant refused to purchase, but said that if he wanted one he would send his order to the factory. Defendant and his clerk testified that Mr. McLeod represented the machine to be better than the one defendant was then using, and that McLeod offered to allow $10 in cash for defendant's old system. The circuit judge found that the telegram and letter did not of themselves constitute a binding contract, but were based on the offer of McLeod, made August 24th, and that such offer was a part and parcel of the contract, and that the plaintiff committed a breach of its contract in refusing to accept $125 and the old system, and therefore could not recover.

Belmont Waples, for appellant.

Herb. M. Norris, for appellee.

Grant, J. (*after stating the facts*). Both parties agree that no contract was made on August 24th. There is also no evidence tending to show that the statement made by the plaintiff's agent was intended by either the agent or the defendant as a standing offer for the defendant to accept at some time in the future suited to his convenience. The defendant testified that he expressly refused to buy of the agent, and told him if he concluded to take one he could buy it later. The agent testified that defendant said if he concluded to buy he would send his order to the factory. Under the defendant's own testimony, he had no reason to suppose that the agent would write his principal of his rejected proposals, or that plaintiff knew anything of the terms which the agent had offered.

It was clearly understood that negotiations for the pur-

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chase of a machine from the agent ended, and that if the defendant should conclude afterwards to order a machine he would deal directly with the plaintiff. The price of the machine which he ordered by a telegram and followed by his letter was to be advanced on the 1st of September to $175. The defendant knew this, and therefore ordered the machine so as to save the advance. The letter contained all the essential terms of a contract: "Price, $135.00. You may ship at once." Plaintiff would naturally infer that the defendant had been informed of the proposed advance in the price, and that he desired to take advantage of the old price, and therefore stated the terms of the agent's offer, viz., $135.

Under defendant's contention, essential parts of the contract as claimed by him rested in parol, and would render the contract void under the statute of frauds. *Hall* v. *Soule*, 11 Mich. 494; *Palmer* v. *Mill Co.*, 32 Mich. 274; *Webster* v. *Brown*, 67 Mich. 328; *Baumann* v. *Lumber Co.*, 94 Mich. 363.

No standing offer having been left by the agent with the defendant, the defendant could not incorporate the oral representations or proposals of the agent in a subsequent written order to the principal, and make them binding upon it, without specifying what the representations or proposals were. Plaintiff was justified in assuming that he was making a sale of a machine for $135 in cash, and that those were the agent's representations referred to in his written proposal. We think the court erred in his findings.

Judgment reversed, and judgment entered in this court for plaintiff, with the costs of both courts.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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APPLEMAN v. HAHN.

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1. JUSTICES OF THE PEACE—JURISDICTION—MANNER OF RAISING QUESTION.

Where the want of jurisdiction of a justice of the peace, because of nonresidence of the parties, is not apparent on the face of the record, a plea to the jurisdiction, properly verified, or a motion to quash, likewise verified, is the proper manner in which to raise the question, and not by an unsupported motion to dismiss.

2. SAME—MOTION—SUPPORTING PROOF—NECESSITY.

A motion to dismiss a suit in justice's court because of the nonresidence of the parties, nonresidence not appearing on the face of the record, and the motion not being supported by any proof, is properly denied.

3. SAME—REVIEW—CERTIORARI—QUESTIONS CONSIDERED.

On certiorari to review a judgment of a justice of the peace, plaintiff cannot retry questions of fact on new affidavits and proofs in the circuit court; the office of the writ being to review questions of law.

Error to St. Joseph; Yaple, J. Submitted June 7, 1907. (Docket No. 53.) Decided July 13, 1907.

Assumpsit in justice's court by William Appleman against Ammon Hahn for excessive fees collected in the capacity of a public officer. There was judgment for plaintiff, and defendant brought certiorari to the circuit court. There was an order affirming the justice's judgment, and defendant brings error. Affirmed.

Wilbur F. Thomas and *H. O. Bliss*, for appellant.

George H. Arnold, for appellee.

HOOKER, J. The township of Park lies immediately north of the township of Lockport, in the county of St. Joseph. The city of Three Rivers was constituted from

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a portion of the territory within the original limits of the township of Lockport, but no part of it is contiguous to the township of Park. The plaintiff brought an action of assumpsit against the defendant before a justice of the peace of the township of Park, summons being returned personally served. The defendant appeared specially for the purpose of moving the dismissal of the case, "upon the ground that the court has no jurisdiction over the persons of the parties, because it appears that plaintiff and defendant reside in the city of Three Rivers, which said city does not adjoin the township of Park." The motion was overruled, and defendant took no further part in the proceedings; and the justice proceeded with the cause and rendered a judgment for the plaintiff. The defendant removed the cause to the circuit court by certiorari, where it was affirmed, and it is now before us on writ of error issued at the instance of the defendant.

The return shows that the plaintiff had, prior to the commencement of this action, been arrested upon a criminal warrant, by the defendant, who was deputy sheriff, and taken before the magistrate who issued the warrant, where he pleaded guilty to the charge, and was sentenced to pay a fine and the costs, which were taxed, and which plaintiff paid. The costs as taxed included an item of $1.70 for the fees of the defendant. This action was begun upon the claim that said charge was excessive, to the amount of $1. Plaintiff declared orally "upon the common counts in assumpsit, and especially for money received by the defendant for official duty or services as deputy sheriff, over and above such as are allowed by the laws of this State, and contrary to and in violation of the statutes of the State of Michigan (3 Comp. Laws, §§ 12012, 11240, 11241, and 11242) relative to asking or receiving other or greater fees or reward for services as an officer than are allowed by the laws of this State, and providing the penalty for the same." Defendant did not plead. The special appearance, motion, and denial thereof appear from the return, and it also appears that the alleged over-

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charge was proved to have been $1, and thereupon the justice rendered judgment for $3, and costs, taxed at $4.55. The errors assigned were:

1. That the court was without jurisdiction, for the reason that both parties lived in Three Rivers.
2. That plaintiff's right had been adjudicated in the criminal case by the taxation of the fees at $1.70.
3. That the judgment for $3 was not warranted under the declaration, which claimed only "single damages."

Regarding these assignments, the justice returned that, "as to the place of residence of the parties, there was no evidence before him intimating in any way the place of residence of either party, and none was offered in support of the motion; that as to a former adjudication no such question was raised before him; that as to the damages he determined them to be $3 from the declaration and the statutes." Subsequent to the filing of the return, a motion for an amended return was made, which was supported by affidavit, to the effect that, upon the hearing of the motion to dismiss, it was conceded by plaintiff's counsel that both parties resided in Three Rivers. Such return being ordered, the justice filed such return, which stated that no such concession was made, that he did not know of such fact, and that he did not take the matter under advisement for the purpose of determining whether he had jurisdiction, when both plaintiff and defendant resided in said city, and overruled the motion because he did determine that he had, and that he based his decision on the ground that no evidence had been offered as to the residence of either party. At circuit the court held that, in the absence of evidence, the court could not presume that the parties lived in Three Rivers, and, as stated, affirmed the judgment.

The want of jurisdiction in this cause was not apparent in the face of the record at the time the motion was made, but depended upon matters dehors the record. A plea to the jurisdiction, properly verified, would have been a proper way to raise the question. Under our practice it

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is also proper to raise it by a motion to quash, setting up the facts relied upon, and ordinarily such motion should be verified.

The defendant submitted the question without offering any proof in support of his motion, and we think that it was not error on the part of the justice to deny the motion to dismiss the case under such circumstances. The office of a writ of certiorari is to bring up the record for review on questions of law, and unless it shows an error of law below, the judgment must be affirmed. The plaintiff in certiorari cannot retry the question of fact on new affidavits or proofs in the circuit court.

The judgment is affirmed.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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ABREY *v.* DUFFIELD.

1. WILLS—CONSTRUCTION—BEQUEST TO SCRIVENER.

Where it is claimed that a will bequeaths the residuum of a trust estate to the trustee, who was also the scrivener who drew the will, and was a lawyer familiar with the phrases and language commonly used to create a devise or bequest, the circumstances not only invite great circumspection, but authorize the court to construe the provision as unfavorably to the claim of the trustee as the language used will permit.

2. SAME — TESTAMENTARY TRUST — CONSTRUCTION — RESIDUUM TO TRUSTEE.

Where a will bequeaths a fund to the scrivener in trust, and provides that in case any remainder be left after execution of the trust "he shall appropriate the same to the de-

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fraying of the expenses of this trust, or in such other or different manner as he may deem best," the trustee does not take the residuum personally, but the clause should be construed as directing the trustee to devote the remainder of the trust fund to some undefined purpose apart from an individual use, and the clause being inoperative for vagueness and uncertainty, the residuum passes to the heirs as intestate property. GRANT, J., MCALVAY, C. J., and CARPENTER, J., dissenting.

3. ATTORNEYS—ETHICS—BEQUEST TO SCRIVENER.

It is contrary to the spirit of the code of ethics for a lawyer to draft a will making dispositions of property in his favor, and the court looks upon such dispositions with suspicion.

Cross-appeals from Wayne; Brooke, J. Submitted October 17, 1906. (Docket No. 43.) Reargued June 10, 1907. (Docket No. 1.) Decided July 13, 1907.

Bill by Catherine A. Abrey and others against Bethune Duffield and another for a construction of the last will and testament of Theresa Abbott, deceased. From the decree rendered, complainants and defendant Duffield appeal. Affirmed.

Mrs. Theresa Abbott died testate April 2, 1890. The material parts of her will are as follows:

"*First.* I direct my executor, hereinafter named, to see that I am buried in the lot of my beloved daughter Alice T. Chesebrough, now deceased, in the Elmwood Cemetery at Detroit, and to do all things necessary in connection therewith in the way of a monumental stone or stones.

"*Second.* I direct that my debts remaining unpaid, whether on mortgage or otherwise, shall be by my executor fully paid, together with all expenses and charges of closing my estate and performing the trusts in this will contained.

"*Third.* I hereby give, devise and bequeath all my real and personal estate with full power to sell and convey and convert the same into money unto D. Bethune Duffield, my executor and trustee, to whom I commit the same with instructions as far as he can and in the exercise of

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his best discretion to carry out my wishes as herein expressed, viz.:

"1. That in case my son Thomas H. Abbott survives me that he, my executor and trustee, will pay so much each year and no more as will secure an economical and comfortable support to him while he lives; and in case he should become enfeebled by disease and helpless, then that he be provided with comfortable support and quarters at Harper Hospital in the city of Detroit and to this end my executor is here instructed and directed, leaving it to the discretion of my executor whether under special circumstances he should be allowed anything over this annual provision made for him. * * *"

Then follow several specific bequests unnecessary to mention. The fourth, fifth, and sixth clauses are as follows:

"In case any remainder be left in the hands of my executor and trustee, then he shall appropriate the same to the defraying of the expenses of this trust, or in such other or different manner as he may deem best.

"In case of the death of said D. Bethune Duffield, executor and trustee as aforesaid, before these trusts shall have been fully carried into effect, then I here name his son Bethune Duffield as his successor in this trust with like powers as are herein conferred upon his father, and both are hereby relieved from the necessity of entering into bonds as such executor and trustee.

"I direct my executor to set apart a certain sum to keep the lot in Elmwood Cemetery in neat and orderly shape and condition forever."

She made three codicils. The second codicil contained the following provision:

"I hereby revoke the provisions of my said will relative to the disposition of my piano and direct that my son Thomas is to have the use and possession of it during his life, but that the same is not to be disposed of by him. At the death of my said son, my executor is to make such disposition of my piano among my relatives as provided in my said will as he may deem best."

Mr. D. Bethune Duffield, the first executor and trustee, died March 12, 1891, and the defendant Bethune Duffield

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was immediately appointed as the administrator de bonis non with the will annexed. The defendant trustee regularly filed annual statements of his accounts, and was allowed each year compensation for his services. Thomas H. Abbott died April 28, 1901. The respondent and his father in his lifetime carried out the trust. The estate has been converted into cash, and there remains in the hands of the defendant $2,569.55, subject to the payment of $300 for the care of a cemetery lot, as provided in the will, and also to any further claim for services. Complainants are the heirs of Mrs. Abbott, and filed this bill to obtain a construction of the will. The court held that the title to the entire estate was conveyed to the trustee by the third clause of the will; that the whole estate was taken absolutely in trust; that the fourth clause contained no language equivalent to a gift or a devise, but was simply a direction to the trustee what to do with the trust funds possibly remaining in his hands after the specific object of the trust had been performed, and that such direction was void for uncertainty. Decree was entered for a distribution of the funds in the defendant's hands among the complainant heirs, directing the probate court to fix the amount of defendant's compensation and charging him with interest from the filing of the bill. Both parties appeal.

Graves & Hatch, for complainants.

William J. Gray, for defendant Duffield.

GRANT, J. (*after stating the facts*). Probably, in the multitude of cases that have come before the courts of this country and of England for construction, the provisions of no two wills or trust deeds are exactly alike. The courts and law writers recognize that—

"No general rule can be stated that will determine when a conveyance will carry with it a beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general

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purpose and scope of the instrument." 1 Perry on Trusts (4th Ed.), § 151.

In each case, where the language is unambiguous, courts must ascertain from the four corners of the instrument the intention of the testator, and enforce that intention, unless unlawful.

Counsel for complainants say that the "familiar canon of construction is that the intention of the testatrix must be ascertained, and, if legal and adequately expressed, must prevail." The same counsel quote the language of *Ralston* v. *Telfair*, 2 Dev. Eq. (N. C.) 255, as well stating the doctrine:

"There is a distinction between an express trust for an indefinite purpose, and those cases where, from the indefinite nature of the purpose, the court concludes that a proper trust could not have been intended, though words may have been used, which, had the objects been definite, would by construction import a trust. In the first description of cases the devisee does not take beneficially; in the latter, he does."

The language of the will in question contains no ambiguity. If the testatrix intended to vest in her trustee complete and uncontrolled dominion over the residuum after the execution of the trust the defendant is entitled to a decree.

The testatrix had other children, but the chief object of her solicitude was her son Thomas. For reasons which do not appear, and which are immaterial, she evidently considered him incompetent to manage his estate. She therefore desired to provide for his maintenance and care to the extent of the expenditure of all of her estate if necessary. No contest was made over the will. She chose as her executor and trustee a man of high character and repute, to whom she referred in her last codicil, executed shortly before her death, as her friend. She chose to provide that in the event of his death his son should succeed to the trust. She had confidence in them, and the result shows that the confidence was not misplaced. The an-

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nual accounts rendered showed that the defendant advanced money of his own for the care of his cestui que trust for several years; one year the balance due him being $1,368.17. She evidently contemplated that the two executors named would live to execute the trust. She also contemplated that the entire estate might be used in its execution, and also that there might be a residuum after its execution. It is clear, also, that she intended to make a testamentary disposition of her entire estate, both real and personal.

The third clause of the will conveyed the entire title, as the judge found, to the executor named. It is clear that she did not intend the residuum, if any there were, to go to her other children. The language of the fourth clause cannot be construed to indicate any such intention. She did intend to dispose of it otherwise. If the fourth clause were eliminated, then, under the universal rule in this country and in England, since the enactment of 1 Wm. IV, chap. 40, the residuum must be divided among the heirs. 1 Perry on Trusts (4th Ed.), § 155. Even prior to that enactment the courts of England were astute to find language which would make the executors trustees rather than beneficiaries, and "therefore a little matter was sufficient to show that intent." *Bishop of Cloyne* v. *Young*, 2 Ves. Sr. 91, decided in 1750. The trust was exclusively for the benefit of her son, except as to a few specific bequests. It ceased with his death. She clearly intended that it should. She could dispose of the residuum as she pleased. She attempted to do so. What did she intend? is the sole question.

The fourth clause provided for no trust after the first trust had been executed. She provided that he should appropriate it to defraying the expense of the trust, viz., the trust for the benefit of her son, or in such other or different manner as he should deem best. No secret trust is even hinted at; no suggestion of a desire to make any one the object of her bounty; nothing upon the face of the will to indicate that the testatrix had any object or

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person other than her trustees in mind to whom she desired the residuum to go. The common expression "in trust" does not appear in the clause. The language clearly indicates that she gave it to him to appropriate as he should deem best. If there had been no trust, if the will had simply devised the property to him to appropriate as he should deem best, under the authorities, the title would have passed to him, and he could appropriate it to himself or to others. With the trust executed, the same rule of construction must apply. The language itself excludes the idea of a trust. It conveys dominion over the entire property, not for any trust, expressed or implied, but to use as the devisee should see fit. There is no room for the application of the doctrine of an express trust for an indefinite purpose.

In all the cases cited by counsel for the complainants, there is language from which it may fairly be inferred that the executor or trustee took it in trust for some purpose, as in *Minot* v. *Attorney General*, 189 Mass. 176, where the testator provided that his residuum should be distributed by his executors "to charitable or worthy objects, or such as I may designate during my lifetime," etc. The court correctly held that it was the intention of the testator to create a trust of some kind. Similar cases are *Morice* v. *Bishop of Durham*, 9 Ves. Jr. 399; *White* v. *Crossman* (N. J. Eq.), 64 Atl. 168; *Forster* v. *Winfield*, 142 N. Y. 327. The following cases appear to support the conclusion which we have reached: *Beck's Appeal*, 116 Pa. 547; *Powell* v. *Powell's Ex'rs*, 2 Murph. (N. C.) 326; *Gibbs* v. *Rumsey*, 2 Ves. & B. 294; *Bulfer* v. *Willigrod*, 71 Iowa, 620; *Taft* v. *Taft*, 130 Mass. 461; *Jacob* v. *Macon*, 20 La. Ann. 162; *Apreece* v. *Apreece*, 1 Ves. & B. 364; *Paice* v. *Archbishop of Canterbury*, 14 Ves. Jr. 370; *Jones* v. *Jones*, 25 Mich. 401.

The learned circuit judge held that under the contention made by the defendant the residuum, in case of the death of the successive executors before the execution of the trust, would go to a stranger, whom the court would

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appoint, and that it cannot be supposed that the testatrix would have disposed of such residuum to a trustee, an entire stranger. The correctness of that conclusion may be doubted. That question, however, is not before us. She did provide expressly that either of the two named should appropriate the residuum in any manner he chose, and gave him exclusive dominion over it. What the courts would hold in the event of the death of both executors before the execution of the trust, it is unnecessary to consider. The possibility of the result named has no influence upon the question of her intent as found in unambiguous language. No case cited, or any that I have found, refers to the possible contingency of the death of the executor or trustee before the full execution of the trust as having any influence in the construction of the language used.

Decree should be reversed, and decree entered in this court for the defendant. No costs will be allowed.

MCALVAY, C. J., and CARPENTER, J., concurred with GRANT, J.

BLAIR, J. I think that the circuit judge arrived at a correct conclusion in this case, and that his decree should be affirmed. While the intention of the testatrix is the main subject of inquiry, it is necessary to specify in this case the particular intent to be made the subject of inquiry. In my opinion, it is wholly immaterial, for the purpose of this inquiry, whether the testatrix intended to give anything to complainants. Their case is planted upon the proposition that she did not intend to give it to them, but has failed, through the vagueness and uncertainty of her will, to give it to anybody else. Neither is the fact that testatrix intended to dispose of her entire estate important. Complainants' position is, substantially, that she did intend to dispose of her entire estate, but has failed to state how she intended to dispose of the particular part of it in controversy here, which, therefore, passes to them as though she had died intestate. The particular intention

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to be ascertained, therefore, is whether the testatrix intended to give the residuum of her estate to her executor and trustee. If she did, the decree should be reversed.

There is no claim that the original executor or his successor acted otherwise than in the utmost good faith, but in determining the meaning of this will we can have no reference to the characters or conduct of the persons named as trustees. This is practically an amicable suit to obtain a construction of the will, desired by both parties. As said by the court of appeals, in *Forster* v. *Winfield*, 142 N. Y. 327:

"Before a gift to executors eo nomine can be held to vest in them individually, the intention that it should so vest must be plainly manifested."

Furthermore, this will was drawn by the original trustee, himself a lawyer, and familiar with the phrases and language commonly used to create a devise, or bequest. This circumstance not only invites great circumspection, but authorizes the court to construe the language used as unfavorably to the claim of defendant as the language will permit.

There is no devise, gift, or bequest contained in the fourth clause of the will. The grant is in the third clause, and that is not to the individual, as an individual, but as a trustee. The fourth clause simply contains a direction what to do with the remainder of the trust fund. The amounts to be paid by the executor for the support of the son Thomas, and to contribute to the support of her sister, Jane Lovell, are largely left to the discretion of the executor, and the exercise of that discretion would directly affect the amount of the residuum. While this circumstance would not invalidate a gift of the residuum to the executor, it is worthy of consideration in determining whether the testatrix intended to make such a gift. If the testatrix desired to give the remainder of her estate to the executor, no reason is perceived why the executor, when drawing the will, could not have so stated in a few

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clear words. I am of the opinion that, if such had been the intention, there would have been no room for doubt in its expression in the will. This clause, in my judgment, should be construed as directing the executor to devote the remainder of the trust fund in his hands to some undefined purpose apart from an individual use, and falls within the principle of *Minot* v. *Attorney General*, 189 Mass. 176, and *Forster* v. *Winfield*, 142 N. Y. 327.

In *Forster* v. *Winfield*, the testator, after providing for the payment of debts, proceeded as follows:

"And the net residue after payment of all such debts, I give to my said executors and to the survivor of them as joint tenants. I have entire confidence that they will make such disposition of such residue as, under the circumstances, were I alive and to be consulted, they know would meet my approval."

The court say:

"The last part of this clause does not qualify what precedes it. There he says: 'I have entire confidence that they will make such disposition of such residue, as, under the circumstances, were I alive and to be consulted, they know would meet my approval.' This language does not necessarily imply that they were to take the land or its proceeds as individuals. It was just as appropriate in its relation to them as executors. He gives the real estate or its proceeds to them upon some undefined trust, a confidence not disclosed. The testator evidently supposed that the secret trust would be carried out, and possibly that it could legally be enforced."

In the case before us the provision is:

"In case any remainder be left in the hands of my executor and trustee, then he shall appropriate the same to the defraying of the expenses of this trust, or in such other or different manner as he may deem best."

If this provision had ended with the word "trust," there could be no question that the trustee would not take the remainder, as an individual, but would hold it in

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trust. In my opinion, the rule of noscitur a sociis should be applied to the alternative clause, "or in such other or different manner as he may deem best." The disposition of the remainder under the alternative clause, like the disposition of the remainder under the original clause, was to be a disposition of property by a trustee holding it in trust; the difference being that in the one case the trust is disclosed, in the other case it is not disclosed. This construction is strengthened by the provision which gives the successor in the trust "like powers as are herein conferred upon his father," clearly indicating the view of the scrivener as well as of the testatrix that she was clothing him and his successor with powers over a trust estate, and not investing them with property rights.

The whole will manifests the extreme confidence of the testatrix in the executor and his son, and her willingness to leave the disposition of her estate very largely to their discretion. The amount to be paid for a monumental stone; the amount to be devoted to the support of the son, and the additional provision that "my executor shall appropriate and pay to him, in case he shall deem it for his best interests, the sum of two hundred dollars per year, or such other or different sum as he may think best;" the provision for her sister, Jane Lovell, and the amount which should be set apart for the cemetery lot—in fact, the most important provisions of the will, depend for their execution largely upon the discretion of the executor. In view of this confidence, it appears to me reasonable to suppose that the testatrix was willing to leave the disposition of the remainder of the trust fund to such trust purposes as her trustee, acting as a trustee and not as an individual, should think best. The case of *Beck's Appeal*, 116 Pa. 547, is cited as opposed to this conclusion. The same court refer to that case in *McCurdy's Appeal*, 124 Pa. 99, as follows:

"But the doctrine of *Beck's Appeal* ought, if possible, to be restricted rather than extended. Its practical application in that case was a disposition of the testator's residuary estate apparently very different from that which he

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intended himself, because, if he meant so to do, he could by his will easily have given his whole residuary estate to his executor by name, without referring to 'objects, persons, or institutions.' Besides, it is entirely repugnant to all our ideas of integrity and honesty that an executor should take to himself absolutely the estate which was given to him in confidence that he would appropriate it to other objects and purposes, and in any case, where such a disposition of a testator's estate is claimed, it seems to us that the strictest construction of the will should be invoked to prevent its consummation."

If, as defendant's counsel contends, and I believe correctly, the intention of the testatrix is to be ascertained and enforced, it clearly follows that the decision in *Beck's Appeal* should not be followed. It seems improbable to me that a lawyer of Mr. Duffield's ability understood that the testatrix wished in effect to make an absolute gift to him of the remainder of her estate, and then expressed that intention in the language of this will. Furthermore, to so hold would, in my opinion, be a matter of evil import to be avoided, if possible. By statute, a bequest to a subscribing witness, necessary for proving the will, is declared absolutely void (3 Comp. Laws, § 9268), and this, though the subscribing witness may be and generally is ignorant of the contents of the will. Although there is no statute to invalidate a bequest to a scrivener, the reasons are, at least, as strong for such a statute as in the case of the subscribing witness. I believe it to be generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion. *Dudley* v. *Gates*, 124 Mich. 440. I, therefore, do not believe that Mr. Duffield supposed that he was making provision for his own benefit, and it seems clear from his letters that his son had no such supposition until he was so advised by counsel.

I am for affirming the decree, but without costs.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred with BLAIR, J.

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PEOPLE *v.* MIX.

1. ARSON — PROSECUTION — CIRCUMSTANTIAL EVIDENCE — SUFFICIENCY.

   On an information for feloniously burning a dwelling house belonging to respondent with intent to injure a fire-insurance company, evidence examined, and *held*, circumstantially sufficient to sustain a finding that respondent was actually and personally present at the burning or set fire to or burned the building, though there was no direct testimony that he was present or set the fire, and there were witnesses who testified that he was four miles away when the building burned.

2. SAME—EVIDENCE—ADMISSIBILITY — MOTIVE — VALUE OF PROPERTY.

   A proof of loss sworn to by respondent describing the house, its contents, and the barn and its contents, was admissible in evidence to show the property burned and its value, as showing a motive for the burning.

3. SAME—ABSENCE OF MOTIVE.

   Respondent was entitled, for similar reasons, to show that property not included in the proof of loss was destroyed.

4. WITNESSES—REPUTATION—CHANGE OF DOMICILE — ADMISSIBILITY OF EVIDENCE.

   Where a witness has recently changed his domicile, evidence as to his reputation for truth and veracity at his previous places of residence is admissible within reasonable limits as to time.

5. CRIMINAL LAW — ARGUMENT OF COUNSEL — DEPARTURE FROM EVIDENCE.

   Where it appears that certain of the people's witnesses have been posted as common drunkards, it is prejudicial for the prosecuting attorney to charge inferentially in his closing argument that the posting was done by respondent, there being no testimony to justify such argument.

6. ARSON—INFORMATION—DESCRIPTION OF PROPERTY.

   In an information for burning to injure an insurance company, under section 11544, 3 Comp. Laws, the building burned may be described as a dwelling house, it having been intended to be occupied as a residence, though respondent was not occupying it as such at the time of the burning.

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Exceptions before judgment from Barry; Smith, J. Submitted June 13, 1907. (Docket No. 123.) Decided July 13, 1907.

James B. Mix was convicted of burning a building with intent to defraud an insurance company. Reversed.

Colgrove & Potter, for appellant.

Lee H. Pryor, Prosecuting Attorney (*Thomas Sullivan*, of counsel), for the people.

CARPENTER, J. Respondent was convicted of feloniously burning a certain dwelling house belonging to himself, with intent to injure a certain fire-insurance company who had insured the same against loss by fire. This dwelling house was vacant. It was situated in the township of Castleton, Barry county, about four miles away from the village of Nashville, where defendant resided. The fire destroyed the house and its contents and an adjacent barn and its contents, all belonging to defendant. We are asked to set aside the conviction on several grounds:

First. It is insisted that there was no evidence which justified the jury's finding—as they were compelled to find under the charge of the court and under the law governing the case (*Meister* v. *People*, 31 Mich. 99)—"that the defendant was actually and personally present at the burning or set fire to or burned the building in question." It is true that there was no direct testimony tending to prove that defendant himself set the fire, or was personally present when the building burned. There is, however, circumstantial testimony. That circumstantial testimony is as follows: That defendant endeavored, and unsuccessfully endeavored, to procure others to burn the building; that when he failed in this endeavor, he stated he would burn it himself; that he placed a jug containing, as the jury might infer, either kerosene or gasoline, in the house, and so arranged that it could be readily ignited; that after

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the building burned he endeavored to divert suspicion to others by procuring false testimony; and that the building was insured for more than its value. We think this circumstantial evidence warranted an inference of defendant's guilt. It is very similar to that in the case of *Hamilton* v. *People*, 29 Mich. 173, where this court was of the opinion that an inference of guilt could be drawn. It is contended, however, that this inference cannot be drawn, because other witnesses testified that defendant was at his home in Nashville, four miles away, when the fire occurred. It cannot be said that the testimony of all these other witnesses was inconsistent with defendant's guilt. He might have set fire to this building, and still have been in Nashville at the time testified to by some of them. One of these witnesses had a criminal record. Others may have made a mistake in testifying to the time they saw defendant. We cannot say that the jury were bound to credit their testimony. Neither can we say, as defendant asks us to say, that their verdict was against the weight of the testimony.

Second. For the purpose of showing the articles which were burned, and their value, the people were permitted to introduce in evidence the proof of loss sworn to by defendant. This proof of loss described the house in question, its contents, and the barn and its contents. We think this evidence was properly admitted. It had a bearing upon defendant's motives. It was admissible under the decision of *Hamilton* v. *People*, 29 Mich. 173. There the court said:

"Objection was made to the reception of certain evidence of the amount of hay in the barn. * * * We think that the fact of the fullness or emptiness of the barn might have a very clear bearing upon the question of motive in burning the barn, and we can see no reason for excluding any circumstance showing the extent of the fire and of the property burned."

Defendant was prevented from proving that the fire destroyed certain other property not included in the proof

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of loss. We think this testimony should have been admitted. Within the rule which justifies the admission of the proof of loss, it had a bearing on defendant's motive.

Counsel for the people contend that the exclusion of this testimony was harmless, because the property omitted from the proof of loss was trivial in value. Whether or not he is right in this contention we need not determine, since the conviction must be reversed upon other grounds.

Third. It is contended that the trial court erred in excluding certain testimony offered by defendant for the purpose of impeaching Horace Worden, a witness sworn for the people. Worden was not an unimportant witness. He testified that after the fire defendant offered to pay him $25 if he would give false testimony tending to prove that one Bert Parmeter burned the building. At the time of the trial he resided in the village of Nashville. He had lived there only a few weeks. During the preceding two years, ending with the summer of 1906, he had lived upon a farm in Eaton county, just across the line from Barry. Prior to that time for two or three years he had lived in Nashville; and prior to that, in Vermontville (Vermontville and Nashville are only three miles apart), where he had resided for many years. The testimony excluded tended to prove that Worden had a bad reputation for truth and veracity at the time he lived in Nashville and in Vermontville. We think the court erred in excluding this testimony. It is within the rule laid down in *Hamilton* v. *People*, 29 Mich. 173, where it was said:

"Where an impeached witness has changed his domicile, there appears to be no objection to showing his reputation in both places within a reasonable limit of time."

See, also, *Keator* v. *People*, 32 Mich. 484. Mr. Wigmore, in volume second of his work on Evidence, in section 928, says:

"On principle, the correct solution seems to be that prior character at any time may be admitted, as being relevant to show present character, and therefore, indi-

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rectly, to show the probability as to truth-speaking. The only limitation to be applied would be that applicable to all use of a former condition to show a present one, * * * i. e., that the character must not be so distant in time as to be void of real probative value in showing present character; this limitation to be applied in the discretion of the trial court."

In support of this proposition many authorities are cited. The objection to the contrary rule, which was in this case adopted by the trial court, is forcibly presented by Campbell, C. J., in *Norwood* v. *Andrews*, 71 Miss. 641. He says it would—

"Preclude the possibility of impeaching the character of one who had changed his residence in many cases. The rule must work both ways, and, under the rule we condemn, one who had maintained an unblemished reputation through a long life, in case of removal and occasion in his new home to prove his good character where he had spent his life, would be denied the right to call witnesses who had known him at his former residence, because not acquainted with his reputation at his new place of abode; and one who had not lived long enough at a place to become known there would not be able to prove reputation at all."

It is believed that the decisions of this court are in harmony with the rule stated by Mr. Wigmore. In making this statement, I have not overlooked *Webber* v. *Hanke*, 4 Mich. 198, where this court held that, where a witness had a fixed abode for five years (and that is not this case), it is within the discretion of the trial court to exclude testimony of his reputation in the country where he lived before that time. We cannot say that the error in excluding this testimony was harmless. Had it been admitted, it may have led the jury to utterly discredit Worden's testimony and to acquit the defendant. The ruling was therefore not only erroneous, but it was prejudicial.

Fourth. It appeared, on cross-examination of certain witnesses for the people, that they had been posted as common drunkards in the village of Nashville. During the closing argument of the assistant prosecuting attorney,

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he used language which, by inference, charged that this posting was done by defendant. There was no testimony to justify this. The prosecuting attorney should have used more guarded language.

Fifth. The information described the house that was burned "as the dwelling house of defendant." Defendant's counsel requested the court to charge the jury that they could not convict the defendant unless this house was "actually used or occupied as a place of abode by the defendant." This request was refused, and defendant alleges error. This court has held (*People* v. *Handley*, 93 Mich. 46) that the term "dwelling house" used in certain statutes means a house that is actually occupied as such. The term itself, however, has a broader meaning. In common parlance, and according to Webster's Dictionary, "a house intended to be occupied as a residence" is a dwelling house. It was in this sense that the building in question was described as a dwelling house, and there is no objection to so describing it, for the guilt of defendant (he was convicted under section 11544, 3 Comp. Laws) did not depend upon the character of the building he burned, or upon the use to which it was put.

No other question demands discussion.

The conviction is set aside, and a new trial ordered.

MCALVAY, C. J., and GRANT, HOOKER, and MOORE, JJ., concurred.

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PEOPLE *v.* SANFORD.

INDICTMENT AND INFORMATION — INCLUDED OFFENSES — INDECENT LIBERTIES—ASSAULT AND BATTERY.

An assault and battery is necessarily involved in the crime of taking indecent and improper liberties with a female child under the age of 14 years, as provided in section 11719, 3 Comp. Laws, and a conviction of assault and battery may be had on an information for that offense.

Exceptions before judgment from Mason; Rose, J. Submitted June 13, 1907. (Docket No. 126.) Decided July 13, 1907.

Volney Sanford was convicted of an assault and battery. Affirmed.

A. A. Keiser, for appellant.

John E. Bird, Attorney General, *Henry E. Chase*, Deputy Attorney General, *Thomas Ambrose Lawler*, Assistant Attorney General, and *App. M. Smith*, Prosecuting Attorney, for the people.

GRANT, J. The indictment in this case contains two counts. The first charges a felonious assault upon one Mary I. Batson, a female 12 years of age, with intent to commit the crime of rape. The second charges the respondent with taking indecent and improper liberties with the person of Mary I. Batson, without committing, or intending to commit, the crime of rape. The respondent was convicted of assault and battery. The evidence on the part of the people is that the respondent pursued the girl, who ran from him, caught her, threw her upon the floor, and put his hand upon her person under her clothes above her knee, and tore her underskirt. The respond-

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ent testified that he had a scuffle with her on the porch, but that it was a friendly scuffle; that she grabbed a pocket piece from his hand; and that he got hold of her and took it away from her.

The evidence was sufficient to sustain a verdict of assault and battery, if the jury believed the story of the girl. They found the assault and battery, but evidently without the intent to commit the crime of rape, or without having taken any indecent liberties with her person. The judge instructed the jury as follows:

"If you are not able to say beyond a reasonable doubt that the respondent is guilty of one of these two offenses, to wit, of assault with intent to commit the crime of rape, or taking indecent or improper liberties with her person, if you should find beyond a reasonable doubt that he took hold of her in an insulting and lustful manner, threw her down on the floor, or placed his arms around her waist in an insulting and improper manner, you would be justified in finding him guilty of assault and battery."

The main point raised is that the crime of assault and battery is not included in either of the offenses charged in the information, and the court erred in instructing the jury that he might be convicted of that crime. We need not determine the question whether the respondent could have been convicted of assault and battery under the first count, where no battery is specifically alleged. A battery is not necessarily, though usually, involved in an assault with intent to commit rape. The better practice is for the prosecutor to allege a battery if he intends to rely upon it. An assault and battery is necessarily involved in the crime of taking indecent and improper liberties with a female child under the age of 14 years, as provided in 3 Comp. Laws, § 11719.

"Any indecent liberties taken with the person of a female against her will is an assault and battery." Tiffany on Criminal Law (4th Ed.), p. 685.

It follows that the respondent was properly convicted

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under this count. No requests were preferred upon this point. Other errors are assigned, but they are not of sufficient importance to discuss.

We find no error, and the conviction is affirmed.

MCALVAY, C. J., and CARPENTER, HOOKER, and MOORE, JJ., concurred.

HAWKINS *v.* BAY CITY.

MUNICIPAL CORPORATIONS—POLICE—COMPENSATION — SUSPENSION. Under the charter and ordinances of Bay City, a police officer is not entitled to compensation during the time he is suspended and renders no "active service."

Case made from Bay; Collins, J. Submitted June 14, 1907. (Docket No. 101.) Decided July 13, 1907.

Assumpsit by Hiram J. Hawkins against the city of Bay City for services rendered. There was judgment for plaintiff for less than the amount claimed, and both parties appeal. Affirmed.

Brakie J. Orr, for plaintiff.

S. G. Houghton, for defendant.

HOOKER, J. The plaintiff is a policeman in Bay City. He was suspended by lawful authority on June 30, 1905. He was tried for neglect of duty and conduct unbecoming an officer, and four of the five members of the committee before whom the trial was had found him guilty of the charges, and recommended that he be discharged. The other member filed a minority report, to the effect

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that he was not guilty, and recommended that he be reinstated. The council adopted the minority report, but it was vetoed by the mayor. This occurred on August 17, 1905.

The plaintiff afterwards presented himself frequently and asked to be assigned to duty, but this was refused, and upon November 13, 1905, he filed a petition for mandamus, to compel the mayor and chief of police to assign him to duty and asking compensation. The learned circuit judge held that the mayor had no authority to veto the action of the council, and that, even if he had such authority, the subsequent inaction of the council had operated to dismiss the charges, and he ordered that the relator be reinstated.

Upon the subject of compensation, it appeared that on September 18, 1905, the plaintiff had presented a bill for compensation claimed from June 30 to September 15, amounting to $152. This was referred to a committee of the council and was reported not a legal charge, for the reason that plaintiff had rendered no service, and it was not allowed. The judge held that he was entitled to such compensation only as the council should allow, and suggested in his order that the council would, doubtless, pass upon the entire claim in the manner provided for in the ordinance. It does not appear when this order was made, but the plaintiff was assigned to duty on March 13, 1906. Subsequently the council allowed him $140, as full payment of his claim against the city. He refused to accept this, and began this action to recover his salary, at $60 per month, for the full period that he had been suspended, amounting to about $500.

The cause was tried upon stipulated facts, and the court found:

"1. That between the 30th day of June, 1905, and the 12th day of March, 1906, both inclusive, the plaintiff was not engaged in 'active service' on the police force as a policeman of the city of Bay City, and therefore is not entitled to the salary payable to a policeman in 'active service,' namely, a salary of $60 a month.

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"2. That between said dates the plaintiff, though a member of the police force of said city, was under suspension and therefore only entitled to such compensation as allowed by the common council during the period between said dates.

"3. That the plaintiff is entitled to a judgment against the defendant for the sum of $140 with interest at five per cent., from April 1, 1906, to date, together with costs of suit, and judgment is ordered for the same accordingly."

Both parties have appealed.

Act No. 514, Local Acts 1903, § 90, provides:

"The common council shall, by ordinance, prescribe the powers and duties to be exercised by said committee, and shall place under the direction of said committee, subject to the supervisory control of the council, the care, control and management of the police force, its organization, government, and discipline, and the custody and control of all public property, books, records and equipments thereunto belonging."

The following ordinance provides for compensation:

"SEC. 3. Such committee shall have the power to appoint a chief of police, and one or more captains, lieutenants, sergeants, court officer, sanitary and truant officer, turnkey, police matron, and such number of policemen with pay, and such number of policemen or watchmen without pay, as it shall deem expedient, which appointments other than chief, shall be made from the members of the police force, and may be revoked at any time when, in the judgment of said committee, the best interest of the city demands it, and the officer affected by such revocation be detailed for such duty as shall be designated by the committee, all such appointments and revocations, however, to be subject to the approval of the common council. For the time engaged in active service, the chief, captains and members of the police force shall be paid such sums as shall be recommended by the police committee and approved by the council."

The case is ruled by *Wilkinson* v. *Saginaw Common Council*, 111 Mich. 585, and the judgment is affirmed.

MCALVAY, C. J., and CARPENTER, GRANT, and MOORE, JJ., concurred.

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BLISS v. LIVINGSTON PROBATE JUDGE.

EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW—POSTNUPTIAL AGREEMENT—EFFECT.

A postnuptial agreement, by which the wife receives certain property "in full satisfaction of all my dower rights or interests in the lands and property of said H. B. * * * intending to bar myself of all rights and interests in any and all the property of said H. B. to which I might become entitled by reason of being the wife of the said H. B. except the right of support and maintenance out of said property during the lifetime of said H. B.," does not bar her right to the statutory allowance for her support out of the estate during administration.

Certiorari to Livingston; Miner, J. Submitted June 18, 1907. (Calendar No. 22,300.) Decided July 13, 1907.

Mandamus by Mary Bliss to compel Arthur A. Montague, probate judge of Livingston county, to fix an allowance for relator's support and maintenance pending the settlement of an estate. There was an order granting the writ, and respondent brings certiorari. Affirmed.

William P. Van Winkle and *Arthur E. Cole*, for relator.

S. S. Abbott and *E. A. Stowe*, for respondent.

MONTGOMERY, J. Relator is the widow of Horace Bliss, deceased, whose estate is being administered by the probate court of Livingston county. She applied to the probate court for an order fixing an allowance under section 8940, 3 Comp. Laws. The probate judge decided that she was entitled to no allowance. Thereupon application was made to the circuit court of Livingston county for a mandamus requiring the probate judge to fix a rea-

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sonable allowance to relator. Such an order was made, and is now before us for review by certiorari.

The probate judge was of the opinion that relator had barred herself of the right to ask for an allowance by a postnuptial agreement, which, in consideration of a conveyance of certain land by her husband to her and of naming her as the beneficiary in a life-insurance policy, relator acknowledged that she accepted the above-named conveyance and agreement—

"In full satisfaction and discharge of all my dower rights or interests in the lands and property of the said Horace Bliss, that he now owns as well as all that he may accumulate or acquire, intending to bar myself of all rights and interests in any and all the property of the said Horace Bliss to which I might become entitled by reason of being the wife of the said Horace Bliss, except the right of support and maintenance out of said property during the lifetime of the said Horace Bliss."

And the question for determination is whether this agreement should be construed to bar the right to support during the settlement of the estate.

The statute was before the court for consideration in *Pulling* v. *Wayne Probate Judge*, 85 Mich. 34. In that case by an antenuptial agreement it was agreed by the relator that in consideration of a payment made and love and affection she, the second party,—

"Hereby agrees to release, and does release, all claim which, upon the death of the first party, she as his widow may have in his estate, whether in right of dower or as her distributive share in the personalty or otherwise, under the laws of this State."

It was said of this provision:

"The agreement here was intended to bar relator's 'right of dower, and all of her right to share in the estate,' and cannot be extended to include statutory 'allowances pertaining to administration.' The claims referred to are those which she, as widow, would be entitled to make at the time of the distribution of the estate."

We are of the opinion that the language of the agree-

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ment in question in this case is no broader to exclude the right of the widow to sustenance during the settlement of the estate than was that in *Pulling's Case*. The reference is to the interests which relator as wife of Horace Bliss should have in his property. This just as clearly means the rights which she would take as distributee as did the clause in the agreement in *Pulling's Case*. They relate to her right which she as widow might have, whether the right of dower or her distributive share in the personalty or otherwise.

The point is made that the exception of the right of support and maintenance out of the property of Horace Bliss during his lifetime should be held to exclude the right to support and maintenance after his death. This contention has some plausibility, but, as the preceding language indicates that the purpose was to bar relator from special rights and interests in property which would come to relator upon distribution of the estate, we think this exception must be held to have been inserted out of abundant caution to exclude any possible claim that from the date of the contract responsibility for relator's support during the lifetime of Horace Bliss was assumed by herself. It is quite as clear that this instrument does not relate to statutory allowances pertaining to administration as that the instrument construed in *Pulling's Case* did not.

The order of the circuit judge is affirmed.

McALVAY, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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JOLIET BRIDGE & IRON CO. *v.* FREEMAN.

DRAINS—BRIDGES—CONTRACTS—IRREGULARITY—EFFECT.

Where a lawful drain has been regularly laid out and established, the drain constructed, the benefits legally assessed, and the assessments practically all paid, the drain commissioner cannot refuse to draw an order upon the drain fund for the price of bridges and culverts erected as a part of the construction of the drain, on the ground of irregularities in the proceedings of his predecessor in letting the contract for said bridges and culverts.

Certiorari to Isabella; Searl, J., presiding. Submitted July 2, 1907. (Calendar No. 22,337.) Decided July 13, 1907.

Mandamus by the Joliet Bridge & Iron Company to compel Clarence H. Freeman, drain commissioner of Isabella county, to issue orders for the payment of certain bridges. There was an order denying the writ, and relator brings certiorari. Reversed, and writ granted.

James H. Davitt (*I. A. Fancher*, of counsel), for relator.

F. MacNamara and *F. H. Dodds*, for respondent.

HOOKER, J. This record shows that the respondent's predecessor, acting in the capacity of county drain commissioner, laid out and established the Lewis Drain, assessing benefits upon the township of Isabella at large. No certiorari was taken, and therefore we are justified in saying that the drain was a lawful drain.

Contracts were let for the excavating in sections, and a separate contract was let to the relator, a builder of iron bridges, for nine bridges and two culverts, i. e., steel tubes, bids for bridges and tubes being first advertised for. These contracts were performed, and the drain com-

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missioner aforesaid certified to the performance of relator's contract, and accepted the bridges and tubes as satisfactory, in 1904, and they have been in use from that time to this. Subsequently, this respondent having become drain commissioner, relator made a demand upon him for orders upon the drain fund for the amount due to it upon the contract, and this was refused. Thereupon an application for a mandamus to compel it was filed in the circuit court, upon denial of which relator removed the proceeding to this court by certiorari.

The respondent's defense is rested upon the alleged invalidity of the relator's contract, and is made by the drain commissioner in reliance upon the case of *Kenyon* v. *Board of Sup'rs of Ionia Co.*, 138 Mich. 544, where we refused a mandamus asked for by the drain commissioner against the board of supervisors to compel the ordering of a drain tax. In that case it was held that, while the law authorized a purchase of drain or sewer tile for the drain under a separate contract, it was necessary for the commissioner to advertise for bids, and let the contract to the lowest responsible bidder, and not having done so, the subject was open to review; the acts rendering the proceeding fatally defective having occurred more than 10 days after the final order of determination by the drain commissioner, and the refusal of the board to act and the institution of the mandamus proceeding having occurred before any work had been done to construct the drain. This decision appears to have been based on section 3860, 1 Comp. Laws, which allows the board to hear objections made by any taxpayer to be affected, and, if it shall find the proceeding defective, to require such defect to be corrected.

In the present case no relief is sought against the board of supervisors, who, so far as we know, has not criticised the proceeding, or attempted to secure a correction of any defect before ordering the tax, nor is it alleged that any taxpayer liable to be affected has asked or sought to be heard by the board. Moreover, the taxpayers have per-

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mitted the relator to complete the performance of its contract. This contest appears to be made at the instigation of the supervisor, Gray, and a highway commissioner, Dunn. Their opposition appears to have taken this form. Both having been present at the letting of the drain sections, and not satisfied with the bid offered upon the bridges, they sought to have another bid made, and claim that they were not afforded an opportunity to ascertain the details of the bridges required. After the contract was executed they joined in filing a bill in chancery against the then acting drain commissioner, in which they alleged their official character, and stated that they filed the bill in behalf of the township; that one-third of the expense of the drain was to be spread at large upon the township; that in their opinion most of the proposed expense of bridges could be saved by using old bridges then erected at or near by; that the contract advertised was not let at the time advertised, but at private sale, at an exorbitant price; that the highway commissioner should have been, but was not, consulted in regard to such bridges. The bill prayed an order requiring Eldred, the drain commissioner, in building these bridges, to meet with said highway commissioner, and co-operate with him in building and placing said bridges, and that said drain commissioner readvertise and relet the contract for furnishing nine bridges and two tubes for said drain. A temporary injunction was issued directing Eldred "not to proceed with the sale of the bridges, nor the placing of said bridges, nor to close the said contract with relator, nor to pay it any money on the same until the further order of the court." This bill was ultimately dismissed by stipulation, after which relator's demand was made on respondent, and he refused to issue the orders. It is inferable that all benefits assessed against private persons have been paid, except $1.60, that one-half of the amount apportioned to the township has been spread and paid, that the board of supervisors have not acted as to the remainder (in conformity to the wishes of Supervisor Gray,

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counsel state because relator will not accept less than the contract price in full payment of its claim).

We have, then, a case where there is a valid drain, completed and accepted by the drain commissioner. No one is disputing its validity, or asking any correction of the proceeding. The only points in dispute relate to technical irregularities in advertising and letting the contract for bridges, and the amount agreed to be paid therefor. Neither of said irregularities was alleged in said bill, or otherwise raised, until after the work was done and payment demanded, when they are raised by the *drain commissioner* as a ground for repudiating the contract of his predecessor after full performance and acceptance. The case is not different than it would be had Eldred remained drain commissioner, and were now refusing to issue an order upon a contract made by himself upon a technical defect which no one else cared to assert before performance. We have often alluded to the inequity of attacks upon assessments made by those charged with benefits after they had secured such benefits, and have refused to permit such to succeed. The law attempts to prevent such abuses by requiring a certiorari at an early stage of the proceedings, and this is supplemented by the application of the rule already stated to irregularities arising at a later stage. By not seasonably moving in this matter, the inhabitants of the town affected may reasonably be held to have waived these defects, which may have been cheaper than to have delayed proceedings for correction, and it is not within the province of the commissioner to repudiate his contract and his acceptance upon the ground of his own or his predecessor's mistake, of which no one else has complained.

The order of the learned circuit judge must be reversed. The writ will issue as prayed, with costs of both courts.

MCALVAY, C. J., and CARPENTER, GRANT, and MOORE, JJ., concurred.

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DOLPH v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

1. EVIDENCE—FORMER TRIAL—ABSENT WITNESS.
   Where it is shown that a witness who testified at a former trial of the case is beyond the jurisdiction of the court, his testimony given at the former trial may be read to the jury.

2. TRIAL—ARGUMENT OF COUNSEL—CREDIBILITY OF WITNESSES—RAILROAD DEFENDANT.
   In an action against a railroad company for negligent fire, arguments of plaintiff's counsel to the effect that defendant's witnesses are not to be believed because defendant is a railroad company are prejudicial and warrant setting aside a verdict for plaintiff.

3. RAILROADS—FIRES—NEGLIGENCE—UNCONTRADICTED EVIDENCE—QUESTION FOR JURY.
   When, in an action against a railroad company for negligent fire set by its locomotive, defendant establishes by reputable and uncontroverted evidence that its appliances were such as good railroading requires, that they were in the condition required by law, and properly managed, the statute (section 6295, 2 Comp. Laws) does not require the question of negligence to be submitted to the jury, but the question is one of law for the court.

Error to Lenawee; Chester, J. Submitted June 8, 1906. (Docket No. 61.) Reargued April 8, 1907. Decided July 15, 1907.

Case by Wira H. Dolph against the Lake Shore & Michigan Southern Railway Company for the negligent burning of plaintiff's buildings. There was judgment for plaintiff, and defendant brings error. Reversed.

Plaintiff's house, a small one, situated about 100 feet from the track of the defendant's road, and woodshed, situated about 80 feet from the track, were destroyed by fire. No one was in the occupancy of the house at the time; neither was any one near when the fire started. The

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house had been vacant for about two months. It was an exceedingly dry time. The grass along the right of way was dry. A very strong wind was blowing directly across the track towards the buildings. The ground was burnt over at one point to within 81 feet of the track. The point at which the fire started and its distance from the track are of course unknown. The negligence charged in the declaration is "the failure to keep its engines in proper condition and repair so as to prevent the escape of sparks." In reply to special questions, the jury found that the engine was properly managed, but that it was not in good order. The case was submitted to the jury, who rendered a verdict for the plaintiff of $750.

Weaver, Morgan & Priddy and *Dallas Boudeman*, for appellant.

Bird & Sampson and *John A. Riley*, for appellee.

GRANT, J. (*after stating the facts*). 1. One McKenzie was a witness for the defendant on a former trial. He was not called by it upon this trial. After the defendant had rested its case, plaintiff was permitted to read to the jury the testimony of this witness upon the former trial. It seems to have been conceded that the witness was beyond the jurisdiction of the court. If the plaintiff failed to show that the witness was beyond the jurisdiction of the court, it was error to admit the reading of his testimony. If he had established the fact that the witness was beyond the jurisdiction of the court, then the testimony was admissible under *Hudson* v. *Roos*, 76 Mich. 173, 180.

2. Counsel for the defendant strenuously insist that there is no evidence that the engine was out of repair. They base this insistence upon the testimony of those who examined the smokestack and appliances shortly before and shortly after the fire. Without detailing the evidence, we are unable to hold that there was no evidence to sustain the verdict.

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3. In addressing the jury, plaintiff's counsel said:

"Any one who may have a fire will find some one coming from the railroad company to testify that the engine was in proper repair. * * * You and I may be in error. You make mistakes and so do I; but you will not make any if you are a railroad man, and if a request is made to your company to pay some man whose house was burned."

Speaking of a witness for defendant, counsel said:

"But my brother says: 'Here is Mr. Osler, and he comes here, and he isn't interested at all. He is not working for the Lake Shore now.' Well, but he was working for the Lake Shore when he swore here upon the other trial. He tells you he left there in February some time. He is on record. He can't go back now and change his testimony. He was just as much under the thumb of the Lake Shore this time as before, because he was already on record in this court."

Again:

"It has been said that juries will find verdicts against the railroad companies simply because they are railroad companies. * * * If railroad companies have earned that sort of a reputation, who is to blame for it but the railroad company itself? The treatment that they have given the people has driven to that, if that is the case."

(This last statement does not seem to be referred to in defendant's brief. We do not therefore treat it as a reversible error, but look at it only to ascertain the spirit with which the former statements were made.) Here is clearly an appeal to the prejudice of the jury. They are asked, in effect, to discredit defendant's witnesses because defendant is a railroad company. It is as if counsel said: "Don't give railroad companies a fair trial, because they are railroad companies." I think every one will concede the injustice of such arguments. It is clearly our duty to condemn them, and to protect litigants from their injurious consequences. That duty compels us to set aside plaintiff's verdict, and to grant a new trial.

4. The principal and most important question presented

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upon the record is, Does the statute (2 Comp. Laws, § 6295) require the issue of fact to be submitted to the jury, where the prima facie case, made by the setting of the fire, is met by uncontradicted evidence that the engine had the necessary appliances — was in good condition and properly managed? Upon this question a reargument was ordered, and the court had the benefit of able arguments and an exhaustive discussion of the authorities. The learned counsel for the plaintiff insist that the statute leaves the question to the jury. Legislatures may make, and have made, railroads absolutely liable for all fires set by their engines. *Campbell* v. *Railway Co.*, 121 Mo. 340 (25 L. R. A. 175); 2 Thompson on Law of Negligence, § 2341. The making of a prima facie case by simple proof of the setting of the fire arose out of the difficulty of a plaintiff to prove the defect, and from the fact that the construction, condition, and management of the engines are peculiarly, if not exclusively, within the knowledge of the company's employés. The rule is reasonable. The railroad company must show that its engines are of the kind and in the condition required by the law. Where witnesses, whose integrity there is no reason to doubt, testified that they made at the time personal examination, and that everything was in good order, and, it being a conceded fact that the best of engines will sometimes set fire, does the law mean that a jury, under these circumstances, can ignore such testimony, and base a verdict of "guilty of negligence" upon the bare fact that the fire was set by the engine? The statute does not so provide in terms. Its language does not necessarily imply that the legislature intended to make the question solely one for the jury. It is a radical departure from the just rule of the common law that he who asserts a tort must prove it. The statute provides:

"That such railroad company shall not be held so liable if it prove to the satisfaction of *the court* or jury, that such fire originated from fire by engines whose machin-

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ery, smoke-stack or fire-boxes were in good order and properly managed." 2 Comp. Laws, § 6295.

The statute shifts the presumption of nonnegligence to a presumption of negligence. See *Fisk* v. *Railroad Co.*, 114 Mich. 248. We there said:

"The statute does not change the common-law liability for setting fires. It simply shifts the burden of proof upon the defendant to show that such fires were not negligently set."

Counsel for plaintiff cite but one case in Michigan bearing upon the subject. *Hagan* v. *Railroad Co.*, 86 Mich. 615. In that case there was evidence of negligence ample to sustain the verdict of the jury. The court said:

"The jury were entitled to consider, as bearing upon the question of negligence, not only defendant's testimony as to the condition of the locomotive, the competency and skillfulness of the engineer and fireman, and the proper management of the locomotive on that occasion, but also the testimony as to the poking of the fire, its effect upon the emission of sparks, and, in that connection, defendant's testimony that it was unnecessary to poke the fire."

There was also testimony in that case that an engine in good order and properly managed could not possibly throw fire 160 feet from the track. Counsel cite *Hemmi* v. *Railway Co.*, 102 Iowa, 25 (2 Am. Neg. Rep. 128). That case is based upon *Greenfield* v. *Railway Co.*, 83 Iowa, 270. The statute in Iowa provides that the railroad company "shall be liable for all damages by the fire that is set out or caused by operating of any such railway." In terms that statute imposed an absolute liability. The court construed it as not imposing an absolute liability, and held that the liability depends upon the fact of negligence. The court held that the proof of damages raised the presumption of negligence, and that "negligence being presumptively established, has for its support every fact by which it might have been established upon proof." The court then proceeds to show that the evidence on the part of the company did not negative every

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possible act of negligence. The court further said that the construction of this section required a holding of absolute liability for such fires, or such a rule as this as to presumptions. The difference between the two statutes is apparent. The case of *Burud* v. *Railway Co.*, 62 Minn. 243, does not sustain the plaintiff's position. The court in that case expressly say:

"There is no doubt of the correctness of the propositions, urged by defendant's counsel, that the statutory presumption is a disputable one of fact, which may be rebutted by showing that the defendant did use due care and was not negligent; that the effect of the statute is merely to cast the onus or burden on the defendant to prove that it was not negligent; also, that, if the evidence to that effect is conclusive, a verdict for the plaintiff could not be sustained."

We do not think that the statute of Michigan makes an issue of fact that must, under all circumstances, be left to the jury. When the railroad company has established by reputable and uncontroverted evidence that its appliances were such as good railroading requires, that they were in the condition required by the law, and properly managed, we think the question is one of law for the determination of the court, and not one of fact to be decided by the jury. Suppose the engine setting fire was new and on its first trip; that its makers testified that it was all the law required; that it was established beyond controversy that it was properly equipped and properly managed, and it was a conceded fact that all properly constructed engines will sometimes emit fire; can it be said that there is any tangible evidence of wrongdoing on the part of the company? We think not. The company in such case has completely rebutted the prima facie case which the statute has created, and is entitled to have a verdict directed in its favor. In *Daly* v. *Railway Co.*, 43 Minn. 319, it was held that the evidence introduced by the defendant was as broad as the presumption, and satisfactorily rebutted any legal inference of negligence. In *Smith* v. *Railroad Co.*, 3 N. Dak. 17, it was held that

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"when the whole case, independently of this artificial presumption, shows that there was no negligence, the presumption cannot be considered for the purpose of making an issue for the jury." In *Menominee River Sash & Door Co.* v. *Railroad Co.*, 91 Wis. 447, it was held that under the statute the presumption "was indulged in merely for the purpose of putting the company to proof, and compelling it to explain and show, with a reasonable and fair degree of certainty, * * * that it had performed its duty in this particular." It was held that the proof overcame any inference arising from the mere fact that sparks and cinders escaped and communicated fire. Without discussing the authorities further, the same holding may be found in *Southern R. Co.* v. *Pace*, 114 Ga. 712; *St. Louis, etc.*, *R. Co.* v. *Ludlum*, 6 Kan. App. 700; *Spaulding* v. *Railway Co.*, 33 Wis. 582; *Kentucky Cent. R. Co.* v. *Talbot*, 78 Ky. 621. The rule is founded in justice and sound reason. See, also, *Ann Arbor R. Co.* v. *Fox*, 34 C. C. A. 497.

I do not deem that the words "to the satisfaction of the court or jury" are of any significance, or tend to show any intention to take a question of law from the court and submit it to the jury. These words are purely expressive of the common-law rule, for in every case the proofs must justify a verdict or a judgment to the satisfaction of the court or jury before which the case is tried. The statute with these words eliminated would mean exactly the same as it does with them in. Under our Constitution and system of jurisprudence the determination of questions of law belongs to the court, and, as a general proposition, the legislature has no power to take that determination away from the judges and transfer it to a jury. The intention of the legislature to take away that power from the judges cannot rest upon presumption, but upon language from which no other intention can be inferred. In every suit at law the plaintiff must by proofs make a case to sustain a verdict and judgment. When the evidence is concluded, the court must determine whether in law

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there are facts shown to sustain the plaintiff's claim. If different conclusions can be drawn from conceded facts, or if the facts are in dispute, the question belongs to the jury. I do not discuss the question whether this power exists as to railroad corporations. It is sufficient in this case to hold that no such intention can, in my judgment, be inferred from the terms of the statute.

For want of a better term I have said in this opinion that the setting of the fire makes a prima facie case for plaintiff. This may not be strictly accurate, but names are immaterial. The statute imposes a liability for fires originating in the operation of the road only when the company fails to make the proof of the facts which are a complete defense.

Judgment reversed, and new trial ordered.

McALVAY, C. J., and CARPENTER, BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred. MOORE, J., took no part in the decision.

HARRIS v. PHŒNIX ACCIDENT & SICK BENEFIT ASS'N.

INSURANCE—ACTION ON POLICY—LIMITATION—WAIVER.

The action of an accident and sick benefit insurance company in writing to the insured in relation to a proposed compromise of his claim that it will hold the matter in abeyance for a few days awaiting a further communication from him, that the proposition made is purely one of compromise, and that the company will in no way waive the conditions of the contract, does not waive a provision of the policy that no action shall be begun thereon after six months from the date on which proofs of loss are required to be filed.

Error to Shiawassee; Wiest, J., presiding. Submitted

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January 23, 1907. (Docket No. 88.) Decided July 15, 1907.

Assumpsit by Sanford Harris against the Phœnix Accident & Sick Benefit Association on a policy of insurance. There was judgment for plaintiff, and defendant brings error. Reversed.

E. J. Adams, for appellant.

Albert L. Chandler, for appellee.

MOORE, J. The plaintiff, a painter by trade, obtained on May 7, 1904, a certificate of membership in the defendant association. May 19, 1904, he received an injury which he contends gave him a claim against the defendant. This suit was brought to enforce that claim. From a judgment in his favor, the case is brought here by writ of error.

Assignments of error in relation to the remarks of counsel, the admission of testimony, and certain portions of the charge, have been examined, but we deem it unnecessary to discuss them. The following conditions are to be found in the certificate of membership:

Section 12, condition B:

"Unless affirmative proofs of loss * * * so furnished to the company, * * * within thirty days from date of * * * termination of disability." * * *

Condition C:

"No action at law shall be maintained before three months, or after six months from the date on which this policy requires proof of loss to be filed."

Condition M:

"If the assured is disabled by accident or illness for more than one month, he or his representatives shall, as a condition precedent to recovery hereunder, furnish every thirty days, a report from his attending physician or surgeon, fully stating his condition and probable duration of his disability."

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The defendant claims a failure to comply with these conditions should prevent a recovery. The circuit judge ruled that both of these conditions had been waived. He based this holding upon the correspondence and upon *Turner* v. *Casualty Co.*, 112 Mich. 425 (38 L. R. A. 529). In the last-named case it appears the delay in bringing suit was caused by the company. We quote from the opinion:

"While the plaintiff was not bound to wait before bringing suit, yet it is apparent that he did wait at the request of the company."

In this case can it be said the delay was caused by the company? The plaintiff says, "Yes." The defendant says, "No." It becomes necessary to look at the correspondence.

The final proofs of loss were filed December 14, 1904. January 11, 1905, would be the last day in which they might be filed. The suit was commenced July 21, 1905. On the 5th of May, 1905, the defendant wrote to the attorney of plaintiff, stating the claim was invalid, but suggesting a doubt as to the first month of disability. The answer to this letter was sent June 8, 1905. The part material to this controversy reads as follows:

"Now, whether or not the technical defense which you suggest has been waived or lost to him is a question of fact which probably would not be profitable for us to discuss here. I do not think he is willing to accept the pay for one month. This probably would not pay his doctor's bill. If you can allow him 50 per cent. of his claim, I think he would take it rather than go into litigation; but if you do not care to make a good fair offer, perhaps you better refuse it entirely, and let him take such course as he thinks is best for him."

On the following day a reply was sent. The material part bearing upon the question of waiver reads as follows:

"Will say, however, that he has never to my knowledge endeavored to get a settlement with the company except to demand full amount claimed in the final proofs

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and as he failed entirely to comply with the conditions of the policy as heretofore mentioned, I am under the opinion that he will not be entitled to over one month indemnity, and feel that it is hardly possible to take a claimant's financial circumstances into consideration in the settlement of claims. The policy itself is a commercial contract, and indemnifies the claimant only to the extent of the conditions provided therein, and the amount of premium he pays will not purchase indemnity under any other conditions. We should regret any litigation in this matter, but there is a principle involved which is of more importance than the amount involved, and I believe when the company agrees to pay all that is provided for in the contract it is all the claimant should reasonably expect.

"I will hold this matter in abeyance for a few days, awaiting further communication from you. It is to be understood, however, that the proposition of one month's indemnity is purely a compromise, and we will in no way waive the conditions of the contract."

In the case of *Turner* v. *Casualty Co.*, supra, a delay was asked until an adjuster of the company could see the claimant or his attorney. In this case the statement is, "I will hold this matter in abeyance for a few days awaiting further communication from you," and this was accompanied by a further statement that the company would not waive the conditions of the contract. The further communication was not sent. The suit was not commenced within the six months required by the contract, but was delayed until July 21, 1905. It is readily seen the case is a very different one than *Turner* v. *Casualty Co.* We think it cannot be held there was a waiver. See *Law* v. *Accident Ass'n*, 94 Mich. 266, and cases cited therein; *Peck* v. *Insurance Co.*, 102 Mich. 52; *Klass* v. *City of Detroit*, 129 Mich. 35; *Cooper* v. *Benefit Ass'n*, 141 Mich. 476.

The conclusion reached above makes it unnecessary to consider the other assignments of error.

Judgment is reversed, and new trial ordered.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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HILLMAN v. HULETT.

1. PRINCIPAL AND AGENT — REPRESENTATION BY AGENT — UNAUTHORIZED ACTS—RATIFICATION.

A telegram from the chief officer of a Nevada lodge of Odd Fellows, addressed to defendant's wife, announcing the death of her father, was delivered to defendant, who authorized the telegraph operator to have the body shipped at his expense. The Michigan lodge, of which deceased was a member, on receipt of a similar telegram, sent a telegram to the Nevada lodge, without consulting defendant, guaranteeing the charges. On learning of the action of the lodge, before arrival of the body, defendant stated to members that the charges would be paid. *Held*, that defendant ratified the unauthorized act of the lodge and made himself liable for the guaranteed charges. BLAIR, MONTGOMERY, and HOOKER, JJ., dissenting.

2. SAME—UNDISCLOSED PRINCIPAL—LIABILITY.

Plaintiff, the undertaker, who prepared and shipped the body upon the order of the Nevada lodge, which in turn looked to the Michigan lodge, was justified in holding defendant responsible as the undisclosed principal for whom both the lodges acted. BLAIR, MONTGOMERY, and HOOKER, JJ., dissenting.

3. SALES—ACTION FOR PRICE—VALUE—EVIDENCE.

Testimony by plaintiff, in support of his bill of particulars stating the items and price of goods furnished to defendant, that he furnished such items, and "charged" the affixed price therefor, is sufficient, in the absence of specific objection during the taking of the testimony, to support a finding that the value of the goods was as claimed. BLAIR, MONTGOMERY, and HOOKER, JJ., dissenting.

4. JUSTICES OF THE PEACE — ACTIONS — PARTIES — JOINT DEFENDANTS—SEVERAL CONTRACTS.

Act No. 187, Pub. Acts 1903, makes the practice in justice's court conform to that prescribed for circuit courts by Circuit Court Rule No. 27c, and authorizes the plaintiff, on appeal from justice's court, to discontinue as to one or more joint defendants and take judgment against those remaining.

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5. STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER — ORIGINAL PROMISE — APPLICATION OF STATUTE.

On delivery to defendant of a telegram addressed to his wife announcing the death of her father, defendant orally authorized the telegraph operator to have the body shipped at his expense. The reply telegram ordering shipment was sent in the name of the wife, and the body shipped to her. *Held*, that defendant's undertaking was a pledging of his own credit on his own behalf, and was not a promise to pay the debt of his wife, and that it was therefore not void under the statute of frauds (section 9515, 3 Comp. Laws) because not in writing.

Error to Macomb; Tucker, J. Submitted February 15, 1907. (Docket No. 32.) Decided July 15, 1907.

Assumpsit by W. S. Hillman against Bert Hulett and Allie Hulett for goods sold and delivered. There was judgment for plaintiff, and defendant Bert Hulett brings error. Affirmed.

William T. Hosner (*Byron R. Erskine*, of counsel), for appellant.

Seymour H. Person, for appellee.

CARPENTER, J. Plaintiff is an undertaker in Tuscarora, Nev. He brings this suit to recover for a casket and shipping box in which the body of one L. F. Harris, the father of defendant Allie and father-in-law of defendant Bert, was shipped from Tuscarora, Nev., to Armada, Mich. The suit was tried before the court, who made a finding of facts and rendered judgment in favor of plaintiff and against both defendants (who are husband and wife). Defendant Bert alone appeals, and asks a reversal of that judgment upon four grounds:

(1) There is no testimony tending to establish his liability.

(2) There was no evidence tending to prove the value of the goods furnished by plaintiff or the reasonableness of his charges.

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(3) Appellant's liability—if he is liable at all—is a several liability, and it cannot be enforced in this suit where he and his wife are sued jointly.

(4) Appellant's alleged agreement was "a special promise to answer for the debt of another," and was therefore void, because not in writing, as required by section 9515, 3 Comp. Laws.

Each of these grounds will be separately considered.

1. Was there testimony tending to establish appellant's liability? In determining this question we should and do state the testimony most favorably to plaintiff. Harris, the deceased, was a member of the Armada Lodge of Odd Fellows. In Tuscarora he affiliated with the Tuscarora Lodge of Odd Fellows. The Tuscarora Lodge looked after him during his last illness, and, when he died, its chief officer telegraphed notice of that fact to defendant Allie and to the Armada Lodge. The telegram to defendant Allie was delivered to appellant Bert, and he thereupon authorized the telegraph operator to have the body shipped to Armada at his expense. The operator sent this dispatch in the name, not of appellant Bert, but of defendant Allie. Very soon thereafter the operator, who was secretary of the Armada Lodge of Odd Fellows, notified other officers of that lodge that appellant Bert had ordered the body shipped at his expense, and the chief officer of that lodge also sent a telegram guaranteeing the charges of shipment. This was done without consultation with appellant Bert, but as an act of kindness to him and upon the assumption that he would pay the expenses which it guaranteed. Before the body arrived, appellant Bert learned of the action taken by the lodge, and he said that the charges would be paid. The two telegrams, viz., the one sent by appellant Bert in the name of defendant Allie, and the one sent by the Armada Lodge, were duly received by the chief officer of the Tuscarora Lodge of Odd Fellows, who directed plaintiff to prepare the body for shipment and to ship it. The trial judge found that "the shipment was undoubtedly made

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and the other expense incurred upon the faith of the Tuscarora Lodge, who in turn looked to the Armada Lodge." The Armada Lodge, it appears from the foregoing facts, was acting for and in behalf—that is, as the agent—of appellant Bert Hulett. It is true that it had no authority to so act, but, by the conduct above stated, appellant ratified its action and made himself liable therefor. Mechem on Agency, § 157; *Heyn* v. *O'Hagen*, 60 Mich. 157. I think the foregoing facts justified the plaintiff in holding appellant responsible as the undisclosed principal for whom both the Armada and the Tuscarora Lodge acted. We are therefore bound to say that there was testimony tending to establish appellant's liability.

2. Was there evidence tending to prove the value of the goods furnished by plaintiff? Plaintiff's bill is as follows:

Metallic lined casket and trimming	$125 00
Shipping box, embalming fluid, etc.	12 00
	$137 00

Upon this bill was credited $20, cash paid, leaving a balance of $117. Respecting this bill, plaintiff's deposition contained the following testimony:

"*Q.* Did you prepare Mr. Harris' body for shipment home, and did you furnish casket, etc., for that purpose?

"*A.* Yes, I did.

"*Q.* What were your charges for the services, casket, etc., in such matter?

"*A.* One hundred and thirty-seven dollars."

The point is now made that the foregoing furnishes evidence of plaintiff's "charge" for the articles furnished, but not of their actual "value." This point assumes that the charges testified to by plaintiff had no relation to value. This is placing upon that testimony a narrow and extremely technical construction. If this construction had been insisted upon during the taking of testimony, when plaintiff could have supplied the needed testimony, it is possible the court might have approved it. But it

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was not then insisted upon. Indeed, the point was not made until the testimony was all taken and the cause submitted. Under these circumstances, it may properly be held that defendant has acquiesced in placing upon that testimony the construction that plaintiff obviously intended should be placed upon it. It is clear that in giving this testimony the plaintiff intended to furnish evidence of the amount of defendant's liability. He intended that from this testimony the court should infer not only that $137 was the *amount charged*, but that that amount was *properly charged* (and perhaps this inference is just. *Ducoign* v. *Schreppel*, 1 Yeates [Pa.], 347). This intention was obvious, and defendant's counsel was bound to know it. Unless he acquiesced it was his duty to speak. He did not speak; nor was anything done, either by him or defendant, his client, to indicate his non-acquiescence. I submit that there was nothing in the testimony of Mr. Hulett, the defendant, quoted by my Brother BLAIR, to indicate his belief that the amount charged by plaintiff did not afford evidence of value. Under these circumstances, plaintiff had the right to assume that defendant's counsel consented to this construction of the testimony, and it is to be presumed that he acted upon this assumption when he submitted his case. To thereafter permit defendant to contend that he did not acquiesce in this construction is to permit him to perpetrate an injustice. I think it is our duty to hold that defendant is estopped from insisting that the construction plaintiff placed on this testimony was not the proper construction, and, therefore, that there was evidence of the value of the articles sued for. The circumstance that the charge of perjury would not lie on this testimony is immaterial. By the concession of counsel courts often act upon testimony which is not under oath. In my judgment, this is such a case. I submit that the principle applied in construing this testimony is not a novel one. It is construed in accordance with the intention of the parties.

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3. Can the defendant's liability be enforced in this suit wherein he and his wife are sued jointly? The point to this objection is not that there has in fact been a joint judgment rendered against defendant and his wife—probably this point is not made, because defendant was not thereby prejudiced—but it is, to quote from defendant's brief, "plaintiff cannot sue jointly on several promises made by different parties." This is precisely what he is permitted to do, in cases *commenced* in the circuit court, by Circuit Court Rule No. 27, subd. *c*, as construed by this court. See *McPherson* v. *Pinch*, 119 Mich. 36; *Durgin* v. *Smith*, 115 Mich. 239; *Root & McBride Co.* v. *Walton Salt Ass'n*, 140 Mich. 441. But as this case originated in justice's court, the question arises whether the rule above referred to is applicable. In *Wright* v. *Reinelt*, 118 Mich. 638, decided in 1898, we held that it did not apply in such cases, citing as authority therefor *Anderson* v. *Robinson*, 38 Mich. 407. In *Anderson* v. *Robinson*, the plaintiff was denied the right given by subdivision *b* of Circuit Court Rule No. 27 (at that time Rule No. 71) to discontinue against one of two defendants, who had appealed to the circuit court from a joint judgment rendered by a justice upon the ground that "the appeal contests the liability asserted in the court of original jurisdiction, and if a joint one, the appellee has no power to change it into an individual liability in the appellate court against the consent of the appellant;" and the court added: "A contrary course would lead to strange and unjust results." Since these decisions were rendered the legislature has, by Act No. 137 of the Public Acts of 1903 (this is an amendment of Act No. 199, Pub. Acts 1899), made the practice in justice's court conform to that prescribed in subdivision *c* of Rule No. 27 for the circuit court. Said Act No. 137 also provides:

"In case the defendants, or any two or more of them, shall take any cause where they are joint defendants by appeal to the circuit court from the justice court, and

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shall file a bond on appeal, and, on the trial in the circuit court, a verdict shall be rendered for one or more of such defendants so appealing, the surety or sureties on such appeal bond shall not be released from his or their liability on such bond by reason of such verdict, but judgment shall enter against said surety or sureties as well as against the defendant or defendants against whom verdict is rendered on such trial in the circuit court."

It seems to us very clear that the purpose of this act was to place cases appealed from justice's court—as to the right of plaintiff to hold one of several defendants liable on his separate contract—on precisely the same footing as cases commenced in the circuit court; and we also think that this statute removes the objections to that practice referred to in *Anderson* v. *Robinson*, supra. This conclusion is in harmony with the decision of *Wilson* v. *Medler*, 140 Mich. 209.

4. Was defendant's promise void, because not in writing? The claim that it is, assumes that it was a promise to pay the debt of his wife. This assumption is unfounded. According to the testimony of the messenger who delivered the telegram—and this testimony appears to have been credited by the trial judge—defendant made himself primarily liable. His was not, therefore, a promise to pay the debt of another, and the statute (section 9515, 3 Comp. Laws) relied on by his counsel does not apply.

In my opinion, the judgment should be affirmed.

MCALVAY, C. J., and GRANT, OSTRANDER, and MOORE, JJ., concurred with CARPENTER, J.

BLAIR, J. (*dissenting*). Plaintiff, an undertaker, of Tuscarora, Nev., brought this suit to recover a balance alleged to be due from defendants for coffin, services, etc., furnished and rendered in preparing the body of L. F. Harris, the father of defendant Allie Hulett, for shipment from Tuscarora to Armada, Macomb county, Mich., for burial. Upon the death of Mr. Harris, J. E. Douglass, noble grand of a Tuscarora Lodge of Odd Fellows,

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sent the following telegrams and received the following replies, viz.:

"TUSCARORA, NEVADA, November 27th.
"Mrs. ALICE HULETT, Armada, Mich.
"Mr. L. H. Harris, your father, died here this morning at seven o'clock. How do you wish the remains disposed of? If buried here, send age and place of birth.
"J. E. DOUGLASS."

"TUSCARORA, NEVADA, November 27th, 1902.
"ARMADA LODGE NUMBER 492, I. O. O. F.,
"Armada, Mich.
"Mr. L. H. Harris, of your lodge is dead. Telegraph instructions.
"J. E. DOUGLASS,
"N. G., Number 30, I. O. O. F."

"ARMADA, MICH., November 27th, 1902.
"To J. E. DOUGLASS, Tuscarora, Nevada.
"Send remains of L. H. Harris here. Charges guaranteed.
"Mrs. ALICE HULETT."

"ARMADA, MICH., November 27th, 1902.
"J. E. DOUGLASS,
"N. G., Number 30, I. O. O. F.,
"Tuscarora, Nevada.
"Send remains of Brother Harris here; charges guaranteed.
"BURTON HODGES, N. G."

The telegram from Mrs. Hulett was sent at 5:47 p. m., and the telegram signed "Burton Hodges" was sent at 7:55 p. m., November 27th. Mr. Wilder, the operator who sent and received the messages, was secretary of Armada Lodge. He sent the message to Mrs. Hulett, who lived in the country, by a Mr. Knickerbocker, who delivered it to Mr. Hulett. Knickerbocker reported: "Hulett instructed him to send a message to have the body forwarded," and "that he would pay the charges;" he said, "Have Mr. Wilder have them forward the body on at my expense." After sending the Hulett telegram, Mr. Wilder saw Dr. Hodges and reported the facts to him and other lodge members on the street, and the lodge

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telegram was sent to guarantee payment by Mr. Hulett. Mr. Hulett knew nothing about the sending of the telegram by Dr. Hodges until the next day. The plaintiff testified:

"*Q.* Who called you to attend the body of Mr. Harris and prepare it for burial?

"*A.* J. E. Douglass, as N. G. of Tuscarora Lodge, No. 30, I. O. O. F.

"*Q.* What was the arrangement made as to your services, casket, etc.?

"*A.* I was directed to do this work by Mr. J. E. Douglass. * * *

"*Q.* What was your charge for the services, casket, etc., in such matter?

"*A.* One hundred and thirty-seven dollars.

"*Q.* What amount has been paid you on that bill and by whom was it paid for you?

"*A.* Twenty dollars by Mr. J. E. Douglass. * * *

"*Q.* On what responsibility then did you do this work and furnish the casket, etc.?

"*A.* On the responsibility of the telegram received by Mr. J. E. Douglass from Armada Lodge, I. O. O. F., directing the shipment of the body home."

Mr. Douglass, noble grand of the Tuscarora Lodge, testified:

"I stated the purport of those telegrams to Mr. W. S. Hillman.

"*Q.* Upon what telegram or telegrams received by you was the responsibility taken of ordering the body of Mr. Harris prepared for shipment and there shipped?

"*A.* On telegram from Armada Lodge.

"*Q.* Who ordered Mr. Harris' body prepared and then sent to his home?

"*A.* I did, on the strength of telegrams from Armada Lodge.

"*Q.* To whom was such order given?

"*A.* To W. S. Hillman."

The body of Mr. Harris was shipped by express, charges prepaid, to Mrs. Hulett, and the bill was made out to her. Mr. Hulett paid to the Armada Lodge $100 received by Mrs. Hulett from a miners' union, and the lodge paid $30

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on the funeral expenses by an order drawn in favor of Mrs. Hulett. Statements of Mr. Hulett to witnesses at Armada were put in evidence, tending to prove that he recognized the indebtedness as his. Mr. Hulett claimed that in all that he did he was acting for his wife and not in his own behalf.

Among others, the circuit judge made the following findings:

"No credit was ever extended by the plaintiff to either of the Huletts, nor did he know them. The shipment was undoubtedly made and the other expense incurred upon the faith of the Tuscarora Lodge, who in turn looked to the Armada Lodge. But this would not preclude the plaintiff from bringing suit and recovering against any one actually liable. The expense was incurred directly upon the personal order of Bert Hulett.

"So far as the question of agency between husband and wife is concerned, I have no doubt but that, where a husband orders funeral arrangements made for a wife's deceased father, he is to be held personally liable unless it affirmatively appears that all parties were informed distinctly that he was acting merely as his wife's agent and did not intend to become personally responsible.

"In my opinion, neither the doctrine of estoppel nor the statute of frauds is involved in this case at all.

"I have carefully examined all the briefs submitted to me, and can come to no other conclusion than that both the defendants are liable."

Plaintiff's counsel contend:

"These facts present a simple case of agency, and the fact that Hulett, as principal, was not disclosed until after the services were performed and the body shipped, does not prevent a recovery from him, when it is learned that he was the undisclosed principal who authorized the expenditure and received the benefit of the services.

"The undertaker knew, through the Tuscarora Lodge, that he was acting for a Michigan family in sending a dead father home.

"The name of the head of that family he did not know, but the wife and local lodge had telegraphed that the charges would be paid, and on the strength of these telegrams plaintiff acted. We have now shown that appel-

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lant was the head of that family; that he authorized the expenditure through his own agents; that both Wilder and the Tuscarora Lodge were his agents; we have traced the services and the casket to him, and know he used them, and have done all that is required of us to recover against him for such services and goods.

"Not only did defendant Hulett expressly authorize the incurring of these expenses, but he has since ratified them by his conduct, and is now estopped from denying his liability."

It is clear that no contract relations existed between the defendant Bert Hulett and the plaintiff. Neither did any contract relations exist between Bert Hulett and the lodge at Tuscarora or at Armada. So far as the Armada Lodge was concerned, he did not request it to guarantee payment of the charges, nor did he know that it had done so until afterwards. He did not communicate to the lodge his action nor authorize the telegraph operator to do so, and the most that can be claimed is that he ratified the action of the lodge after he learned of it. The operator was not the agent or representative of Mr. Hulett, and had no power to bind him; he was merely the messenger to transmit the message sent to the Tuscarora lodge. Neither was the operator the agent of the plaintiff or the Tuscarora Lodge, and anything said to him through Knickerbocker was of no avail to confer any rights upon the plaintiff except as transmitted to the plaintiff and acted upon by the plaintiff. This was not a transaction with an undisclosed principal. The principal was disclosed by the telegram. Plaintiff understood that Mrs. Hulett was the principal; he made out his bill to her, and the body was shipped in her name. Both of the telegrams were stated to plaintiff, and he rendered the services and furnished the coffin, etc., as held by the court, upon the faith of Tuscarora Lodge, which was his employer, and which, in turn, relied upon Armada Lodge. I do not think that it can be said, "The expense was incurred directly upon the personal order of Bert Hulett," so far as the plaintiff is concerned. The expense was in-

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curred directly upon the order of Tuscarora Lodge, guaranteed by Armada Lodge. Mrs. Hulett was liable, because her name was properly signed to the telegram by her authority, and because she actually did order the shipment, to the knowledge of the plaintiff. So far as the plaintiff was concerned, he was in no wise deceived or misled; he acted upon the facts as they were presented to him by telegrams, which spoke for themselves and could not be misunderstood. In order for the doctrine of undisclosed principal to apply, some one must have assumed to act as agent. There was no such situation here. Armada Lodge never assumed to act as agent for Hulett; they guaranteed payment. To hold otherwise, requires the postulate of an undisclosed agent as well as an undisclosed principal. In the case of *Heyn* v. *O'Hagen*, 60 Mich. 150, the shoemaker who ordered the goods represented to the seller that he was the agent of the defendant, and the court held that the defendant, by his conduct, ratified the representation. In the present case, Armada Lodge never represented itself, either expressly or by implication, as the agent of the defendant Mr. Hulett, and the goods were not furnished in reliance upon his responsibility. The case is not an authority for the alleged ratification in this case. It, therefore, follows that the plaintiff cannot recover in this case upon the basis of express contract, but only, if at all, upon the basis of an implied contract to pay for materials furnished and services rendered for defendant's benefit and accepted by him. 9 Cyc. p. 254 (III); *Litchfield* v. *Garratt*, 10 Mich. 426; *Turner* v. *McCarty*, 22 Mich. 265; *Wheeler* v. *Stewart*, 94 Mich. 445; *Bailey* v. *Rutjes*, 86 N. C. 517.

This case is the converse of *Downing* v. *Buck*, 135 Mich. 636. In that case the defendant did not know that the plaintiff was rendering services for him, and it was therefore held that he was not liable for such services. In this case the plaintiff did not know that he was rendering services for the defendant Bert Hulett, but plain-

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tiff's proofs tended to show that the defendant intended that the services should be rendered for him, directed the telegraph operator to wire that the body should be sent at his expense, arranged with another to pay the charges even to the amount of $280, if the body arrived when he was not at the station, made payments on the bill without objection, except as to the amount, and throughout recognized the liability as his, and appropriated and received the benefit of the plaintiff's services and property furnished. Under such circumstances, a finding that Hulett was really acting in his own behalf would be supported by evidence, and he might properly be held liable for the value of the articles furnished and services performed. On the other hand, if it were found that Hulett was really acting for his wife, as he claimed, he would not be liable.

It is contended by defendant's counsel that there was no evidence of the value of the articles furnished or services rendered, and that for this reason a judgment should have been rendered in his favor. Upon this point, the court said:

"The proofs show that Mr. Harris died; that his body was prepared for burial by the plaintiff; that it was shipped to Armada in a casket furnished by him; it arrived there and was buried in the casket provided by the plaintiff; it is, I take it, practically undisputed that all the services charged for were furnished. Defendants saw and had opportunity to inspect the materials, quality, etc., of the goods provided. These facts, in connection with the deposition of W. S. Hillman, it seems to me, sufficiently cover the ground."

The only testimony upon the question of value was that of the plaintiff, above quoted, that his "charge for the services, casket, etc.," was $137, and the following from the testimony of Mr. Hulett:

"*Q.* What is the balance due at the present time?
"*A.* I believe that it is a hundred seventeen dollars and a half.
"*Q.* That is the correct amount due on the account?
"*A.* That is what they claim on it."

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We do not think there was any competent evidence of the value of the services or materials furnished. The word "charge" is not synonymous with "value." Under his testimony in this case, plaintiff could not be convicted of perjury if it should turn out that there was a gross overcharge. Defendant, if liable, could only be held for the value of the services and materials which he appropriated, and not for any fancy sum which plaintiff saw fit to charge. We think it manifest that defendant did not intend to admit that there was any specific sum due, but simply that a certain balance was claimed to be due. The case of *Ducoign* v. *Schreppel*, 1 Yeates (Pa.), 347, holds that a day book is prima facie evidence, not only of the delivery of goods, but of their prices. It is said in the short per curiam opinion:

"How else could the prices of broadcloths, linen, cambric, etc., of different degrees of fineness, be ascertained after a length of time? A contrary doctrine would render our usage of small advantage to the mercantile or mechanical part of the community. * * *

"The necessity of the case, however, which gave birth to our practice in this particular, by no means warrants that entries in day books should be considered as evidence of money lent or cash paid."

I do not think this case is in point. Books of account are only admissible upon proof of their correctness, and, if the case cited holds to the contrary, which I do not understand to be the case, it would be contrary to numerous decisions of this court. *Cameron Lumber Co.* v. *Somerville*, 129 Mich. 552. In my opinion, the case of *Farrington* v. *Wright*, 1 Minn. 241, is directly in point as to the construction which should be given to the plaintiff's testimony. In that case, the defendant in his answer admitted all of the material allegations of the complaint, but alleged by way of counterclaim that "the defendant charged for his commissions thereon twenty-five dollars, leaving a balance of $268 in favor of the plaintiff." The court say:

"The counterclaim for commissions is not adequately

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alleged in the answer to make it available to the defendant below. The allegation is that he 'charged twenty-five dollars for his commission.' He does not allege that the charge was true, or that the services for which he made the charge were worth that or any other sum. In verifying the answer, he, in effect, only swears that he charged that sum, and not that the charge itself was true or just. I do not think that the allegation is sufficient to admit proof to sustain a claim of twenty-five dollars or any less sum for commissions. The existence of such a claim is not alleged, nor can it be implied from the statement that he charged it. Proof that he made the charge, which is all that is alleged, would not alone sustain a claim for the amount charged, or any less sum. Proof of other facts, not alleged, would be required to resolve the charge into a valid legal claim."

The testimony of the plaintiff was taken by deposition, apparently at Tuscarora, Nevada, and there does not seem to have been any cross-examination. If the value of "the services, casket, etc.," for which the plaintiff's "charge" was $137, had been known to him to have been only $50, an indictment for perjury could not have been maintained upon this testimony, because, as said by the supreme court of Minnesota, "he does not allege (swear) that the charge is true or that the services for which he made the charge were worth that or any other sum."

Neither do I think it ought to be held that the defendant acquiesced in a supposed erroneous construction by plaintiff's counsel of the effect of his testimony. I know of no rule of law which requires defendant's counsel, during the course of the trial, to inform plaintiff's counsel that, although he thinks he has proved his case, he has failed to do so. Defendant's plea put every material fact in issue. The burden of proof was upon the plaintiff to establish every material fact by at least prima facie evidence. He failed to do so, and the defendant was, I think, within his legal rights in raising the question as he did at the close of the case. At the close of the testimony, the record contains the following:

"And after such testimony was given, the cause was

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submitted to the said court for decision without oral arguments, but upon written briefs, in which said briefs counsel for defendants, among other things, raised the objection to there being no proof made of the value of the labor and materials for which recovery was sought in this case."

I think also that the testimony of Mr. Hulett on cross-examination was notice to plaintiff's counsel that he did not intend to admit that the balance claimed to be due was correct. He testified:

"*Q.* What is the balance due at the present time?
"*A.* I believe that it is a hundred seventeen dollars and a half.
"*Q.* That is the correct amount due on the account?
"*A.* That is what they claim on it."

Until the plaintiff put in some evidence of the value of the services and materials, defendant was not called upon to produce testimony upon that subject.

The judgment should be reversed as to the defendant Bert Hulett, and new trial granted.

MONTGOMERY and HOOKER, JJ., concurred with BLAIR, J.

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In re ROGERS' ESTATE.

TAXATION—INHERITANCE TAX—NONRESIDENT DECEDENT—SITUS OF PROPERTY.

Mortgages, notes, and land contracts, representing property situated in Michigan, owned by and in actual possession of a nonresident at the time of his death in another State, are subject to the succession tax imposed by Act No. 195, Pub. Acts 1903, since collection of the debts secured upon land cannot be enforced, nor the estate properly administered and closed, without the aid of the laws of this State.

Case made from Livingston; Miner, J. Submitted April 15, 1907. (Docket No. 54.) Decided July 15, 1907.

James B. Bradley, auditor general, appealed to the circuit court from an order determining that certain property was not subject to an inheritance tax. There was judgment for the auditor general, and Polly M. Rogers, ancillary administratrix of the estate of Hosea Rogers, deceased, appeals. Affirmed.

Shields & Shields, for appellant.

John E. Bird, Attorney General (*J. Shurly Kennary* and *Thomas Ambrose Lawler*, Assistant Attorneys General), for appellee.

MOORE, J. This is a case brought for the purpose of recovering, under the provisions of Act No. 195 of the Public Acts of 1903, an inheritance tax. The probate court held it could not be recovered. The circuit court held it could. The facts are not disputed, and, briefly stated, are as follows: Hosea Rogers died at his home in the State of New York in 1904. Administration of the estate was granted in New York. Ancillary proceedings were had in Livingston county, in this State. All of the

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estate which in this proceeding is sought to be bound with an inheritance tax consists of mortgages, notes, and land contracts. All the devisees, legatees, and heirs at law of Mr. Rogers reside in New York. At the time of his death all the mortgages, notes, land contracts, and papers representing property in the State of Michigan were in the actual possession of Mr. Rogers at his residence in New York, and were habitually kept by him at his residence in the State of New York. The mortgages were upon real estate in Livingston county, Mich., and were recorded in that county. Thomas Gordon, Jr., acted as agent for Mr. Rogers in making loans. He had temporary custody of the funds or securities. He never had power to discharge or modify mortgages or other papers, and acted at all times under the specific directions of Mr. Rogers.

It is the claim of the estate that the situs of this very property has been established as in the State of New York. *Village of Howell* v. *Gordon*, 127 Mich. 517. The domicile of the parties owning it, both at the time of Mr. Rogers' death, and now, is in the State of New York, and therefore the property is not subject to an inheritance tax in this State. Several authorities are cited in support of this claim, and it is insisted the case is controlled by the Iowa case of *Gilbertson* v. *Oliver*, 129 Iowa, 568 (4 L. R. A. [N. S.] 953). In that case the justice writing the opinion said:

"The controversy presents for determination but one legal question, namely: Was the property of the deceased within the jurisdiction of this State at the time of her death? There is a conflict in the adjudicated cases as to whether such evidences of indebtedness are taxable at the domicile of the owner, or whether the actual situs of such property, and not the domicile of the owner, determines the liability to taxation. The great weight of authority, however, supports the holding of our own cases that this species of personal property, which is in a sense intangible and incorporeal, is taxable at the domicile of the owner, and not elsewhere, unless the owner has himself given it a different situs."

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This is not in harmony with *In re Stanton's Estate*, 142 Mich. 491. On the part of the State it is insisted the inheritance tax can be collected, and that the case is controlled by *In re Stanton's Estate*, supra, *In re Merriam's Estate*, 147 Mich. 630, and *Blackstone* v. *Miller*, 188 U. S. 189.

It is clear the mortgagee named in the mortgage could not preserve his lien on the real estate against creditors and subsequent purchasers without complying with the registry law of the State. If the debts secured by the mortgages are not paid, they cannot be collected without the aid of the laws of the State. The estate of Mr. Rogers cannot be properly administered and closed without ancillary letters of administration obtained under the laws of this State. In this connection, the language used by Justice Holmes in *Blackstone* v. *Miller*, supra, is pertinent. We quote:

"If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. *United States* v. *Perkins*, 163 U. S. 625, 628, 629; *McCulloch* v. *Maryland*, 4 Wheat. (U. S.) 316, 429. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, etc., R. Co.* v. *Sturm*, 174 U. S. 710. See *Wyman* v. *Halstead*, 109 U. S. 654. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to

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debts the rule still applied to slander that actio personalis moritur cum persona, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

"Power over the person of the debtor confers jurisdiction, we repeat; and, this being so, we perceive no better reason for denying the rights of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim 'Mobilia sequuntur personam' has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.

"There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Mass. 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases. *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, 428; *New Orleans* v. *Stempel*, 175 U. S. 309, 319, 320. In the case at bar, the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect. *Pinney* v. *Nelson*, 183 U. S. 144, 147. The fact that two States, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 53. The universal succession is taxed in one State; the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money. See *Adams* v. *Batchelder*, 173 Mass. 258."

It is suggested that because, when the opinions in *Re Stanton's Estate*, and in *Re Merriam's Estate*, supra,

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were written, the cases arose under section 21, Act No. 188 of the Public Acts of 1899, as section 21 has been amended, those cases are not controlling. The amendment is found in Act No. 195 of the Public Acts of 1903. It consists simply in eliminating from section 21 the words "over which this State has any jurisdiction for the purposes of taxation." We do not think the effect of the amendment is to narrow the provisions of the statute as they existed when the decisions were rendered. We think the case in principle is within *In re Merriam's Estate*, and *Blackstone* v. *Miller*, supra.

Judgment is affirmed.

McALVAY, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

In re SCHNAPKA.

1. TIME—COMPUTATION—SERVICE—PROCESS—NOTICES.
   The rule that fractions of a day are not recognized in law, and that in computing the time for service of process the day of issuance is excluded and the day of appearance included, does not apply to notices measured by hours.

2. INSANE PERSONS—COMMITMENT—NOTICE—SUFFICIENCY.
   An order of the probate court, entered on March 31st, fixing April 1st, at 4 o'clock in the afternoon, as the time of hearing on a petition for the commitment of an alleged insane person, and requiring service on her of notice of the proceedings at least 24 hours before the time set, and a sworn return of service of the required notice dated March 31st, followed by an order of commitment reciting that due notice as required by law and directed by the court had been made, raises a fair presumption that service was made in time to give the court jurisdiction to make the order of commitment.

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Certiorari to Kalamazoo; Adams, J. Submitted June 4, 1907. (Calendar No. 22,299.) Decided July 15, 1907.

Habeas corpus proceedings by Anton Schnapka to obtain the release of Katie Schnapka, his wife, from the Michigan Asylum for the Insane. There was an order remanding her to the custody of the asylum, and petitioner brings certiorari. Affirmed.

Harry C. Howard, for petitioner.

John E. Bird, Attorney General (*Arthur P. Hicks*, of counsel), for respondent.

MOORE, J. This is certiorari to review habeas corpus proceedings had before the circuit judge of Kalamazoo county, who after a hearing remanded Katie Schnapka to the custody of the Michigan Asylum for the Insane.

Counsel for the relator say:

"The only point relied upon by your petitioner, and the only point sought to be raised by this petition, is that the probate court had no jurisdiction to make the order, a copy of which is contained in the petition for the writ of habeas corpus and in the answer of the medical superintendent, for the reason that the records in the probate court do not show that service of a notice of the petition was had on Katie Schnapka at least 24 hours before the hearing as required by section 16, Act No. 217 of the Public Acts of 1903."

The material parts of the order by virtue of which Mrs. Schnapka is detained read as follows:

"At a session of said court held at the probate office in the city of Kalamazoo, in said county, on the 1st day of April, A. D. 1905.

"Present: Hon. George P. Hopkins, judge of probate.

"In the Matter of Katie Schnapka, Insane.

"This day having been appointed for hearing the petition of Antoine Schnapka, praying that said Katie Schnapka be admitted to the Michigan Asylum as a public patient, and due notice of the hearing on said petition having been given as required by law and as directed

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by said court, the said petitioner appeared personally. It appearing to the court, upon filing the certificates of two legally qualified physicians and after a full investigation of said matter, without the verdict of a jury, that said Katie Schnapka is insane, and a fit person for care and treatment in said asylum, and that she should be admitted to said asylum as a public patient."

Prior to making the order just quoted, the court made an order which, omitting some of the formal parts thereof, reads as follows:

"At a session of the probate court for the county of Kalamazoo, holden at the probate office in Kalamazoo, in said county, on Friday, the 31st day of March, in the year one thousand nine hundred and five.

"Present: Hon. George P. Hopkins, judge of probate.

"In the matter of Katie Schnapka, Alleged Insane.

"On reading and filing the petition, duly verified of Antoine Schnapka, of the city of Kalamazoo, alleging that said Katie Schnapka, of the second ward of the city of Kalamazoo, is insane, and praying that she may be admitted on the order of said court, to the Michigan Asylum for the Insane at Kalamazoo, and there supported as a public patient.

"Thereupon it is ordered that Saturday, the 1st day of April, A. D. 1905, at 4 o'clock in the afternoon, be assigned for the hearing of said petition, and that the said Katie Schnapka and all other persons interested in said matter are required to appear at a session of said court, then to be holden at the probate office in Kalamazoo, in said county, and show cause, if any there be, why the prayer of the petitioner should not be granted.

"And it is further ordered, that said petitioner give notice to the persons interested in said matter of the pendency of such petition, and the hearing thereof, by causing a copy of this order to be personally served at least 24 hours previous to said time of hearing upon the said Katie Schnapka."

Upon the back of the last-named order is a sworn return by John P. Shields "that on the 31st day of March, A. D. 1905, he served a true copy of the order, * * * on the within named Katie Schnapka," by delivering the same to her personally in the county of Kalamazoo. The

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circuit judge, upon a hearing, was of the opinion that the probate court had jurisdiction to make the order. He also found as a fact that Mrs. Schnapka was insane at the time she was committed to the asylum, and is still insane.

It is the contention of counsel for the relator that the authority of the probate court to deal with insane persons is derived wholly from the statute, and that because it does not affirmatively appear that service was made 24 hours before the hearing that the probate court had no jurisdiction to make the order. The proceedings in probate court were had under the provisions of Act No. 217 of the Public Acts of 1903. Section 16 of that act provides for a 24-hour notice. Counsel say fractions of days are not recognized in law; that in Michigan the rule for the computation of time always excludes issuance day while the appearance day is included. We think this rule does not apply where the requirement relates to notices measured by hours. Act No. 217 does not provide in terms the manner in which a return of service of notice of hearing shall be made. In *Gillett* v. *Needham*, 37 Mich. 147, there is a pretty clear intimation that proof of the service of an order might be shown in other ways than by a sworn return. It does appear from the record that the petition for the commitment of Mrs. Schnapka was made by her husband on March 31st. It stated his wife was a resident of the second ward of Kalamazoo. The sessions of the probate court are held in Kalamazoo. On the same day the petition was made the court made an order for a hearing on the following day at 4 p. m., and requiring a copy of the order to be personally served at least 24 hours upon Mrs. Schnapka. Upon the same day this order was made a sworn return of personal service was made. Upon the 1st of April a hearing was had, and an order was made in which it was recited, "and due notice of the hearing on said petition having been given as required by law and as directed by said court."

We have then a petition filed by the husband in the

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probate office on March 31st, asking for the commitment of an alleged insane wife who resides in the same city where the court is held. Following the making of the petition, an order of hearing is made, fixing the time at 4 p. m. of the following day at the probate office in Kalamazoo. On March 31st sworn proof of personal service of the order is made. On April 1st a hearing is had, and, as before stated, an order is made in which it is recited that due notice as required by law and directed by the court had been made. It is clear that, if service of the order was made any time before 4 p. m. on March 31st, the full time directed by the court would have elapsed. We think it a fair presumption from what does appear that service was made in time to give the court jurisdiction. Having reached this conclusion, it is unnecessary to discuss the other interesting questions presented by the brief from the office of the attorney general.

Judgment of the court below is affirmed.

McALVAY, C. J., and CARPENTER, GRANT, and BLAIR, JJ., concurred.

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WHEAT *v.* VAN TINE.

1. ESTOPPEL — EQUITABLE ESTOPPEL — ACQUIESCENCE IN ACTS OF DEFENDANT.

   Where a landowner authorized and assented to the removal by village officers of earth from the street in front of his premises, he is estopped to complain of such removal to the extent to which he authorized it.

2. MUNICIPAL CORPORATIONS — STREETS — ESTABLISHING GRADE — LOWERING SURFACE — LIABILITY TO LANDOWNER.

   Where no street grade has been legally established in a village, a landowner cannot recover damages from the village for removal of earth from the street in front of his property for the improvement of the street.[1]

3. SAME — COUNCIL PROCEEDINGS — RECORD — PAROL EVIDENCE — ADMISSIBILITY.

   Though parol evidence is not admissible to contradict the record of the proceedings of the common council of a village, it is admissible to show facts omitted from such record, since the failure of the clerk to properly enter such proceedings cannot affect the rights of individuals who have acted upon the faith of the action of the council, in fact duly taken, but not recorded.

4. SAME — ACTS OF OFFICERS — RATIFICATION — ALLOWANCE OF BILLS — PAROL EVIDENCE.

   Parol evidence is admissible to show that certain bills, audited and approved by a village council with full knowledge of their contents, included the expense of a certain street improvement for the making of which no record authority appears, since what the council could authorize it could ratify, and the allowance of the bills was a sufficient ratification.

5. SAME — LIABILITY OF OFFICERS — ACTS AUTHORIZED BY COUNCIL — RATIFICATION.

   In an action against village officers for unauthorized removal of earth from the street in front of plaintiff's property, evidence examined, and *held*, to conclusively establish that

[1] As to abutting owner's right to damages arising from grading street where no grade formerly established, see note to *Hickman* v. *Kansas City* (Mo.), 23 L. R. A. 658.

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defendants' acts were ratified by the council of the village, and that a verdict for defendants might properly have been directed on that ground.

Error to Tuscola; Beach, J. Submitted June 11, 1907. (Docket No. 69.) Decided July 15, 1907.

Trespass quare clausum fregit by Frederick S. Wheat against George Van Tine and others. There was judgment for defendants, and plaintiff brings error. Affirmed.

Plaintiff is the owner of a lot fronting on Almer street, and also another three-cornered lot located between Almer and Grant streets in the village of Caro. Lot 1 is located at the crest of what is called "Wheat's Hill." Almer street extends over this elevation. At the foot of the hill on Almer street is a ravine through which in time of rains water flowed and washed away the culvert. This had happened two or three times. It was finally determined by the village authorities to construct a cement culvert with a retaining wall to be built on the adjoining land owned by one Patterson, and the proper resolution was adopted. The work was completed, and two years after its completion the plaintiff brought this action of trespass. Of the defendants one is president of the village, another the street commissioner, the others members of the council and of the street and sidewalk committee. The defendants with their plea gave notice that the work was done under the direction of the common council and was ratified and confirmed by the council, and that the defendants as village officers, in directing this work, did no more than to put the street in a reasonably safe condition and fit for travel. The act of trespass alleged is removing the dirt from the street in front of plaintiff's land and thereby lowering it and causing damage to his land. The theory of his claim is that the defendants acted without any record authority of the common council, that their acts were not properly ratified, and that they were therefore trespassers.

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The defendants' theory is that plaintiff invited, assented to, and participated in the acts complained of; that defendants, as officers of the village, were performing necessary work upon the public streets to make them reasonably safe and fit for travel; that, as no grade had been formerly established on this street, the village council could authorize the hill to be cut down without liability to abutting property owners; that any act which the common council could authorize they could ratify; that payment of the bills for the work done, by the authority of the council, was a ratification of the acts of the defendants; and that no damage had been done to the plaintiff's property. The case was submitted to the jury upon this theory, and a verdict rendered for the defendants.

Byron L. Ransford (*Frederick S. Wheat*, of counsel), for appellant.

Pulver & Smith, for appellees.

GRANT, J. (*after stating the facts*). Plaintiff's lots were vacant and unimproved. Near the crest of the hill opposite one lot a mudhole existed in the center of the street, which was bad in wet weather. There were no gutters on the sides of the roadbed. The village authorities and plaintiff recognized the necessity and propriety of fixing the street and the culvert. Plaintiff admitted that he pointed out to the defendants how they might make a grade and excavation by reducing the surface of the street opposite his land, at no point more than eight inches, and thus obtain sufficient earth to fill the street on each side of the culvert which was then being constructed. This suggestion or request from him was reported to the common council. The common council approved the proposition, and directed the work to be done—without entering it upon their records—and one of the defendants reported the action of the council to the plaintiff. Soon thereafter, and before the work was completed, plaintiff went away, and before he returned the work was accom-

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plished. The edge of the roadbed was 17 feet distant from the plaintiff's lot. It appears to be conceded that the work was essential to a good roadbed, and that it was properly executed. The roadbed before this work was done was lower than the surface of plaintiff's lot, but just how much does not distinctly appear. His own witness, one Leonard, a surveyor, testified that the bottom of the gutter was three feet and one or two inches from the surface. He could not tell how much higher the roadbed was than the gutter. He further testified that gutters were necessary, and that the work was "just what it ought to be." Plaintiff's own employés removed earth from the street to his lot during the progress of the work. Plaintiff makes no complaint of the work in so far as it corresponded with his consent and understanding as above stated. His complaint is that the removal of the earth was not in accordance with that understanding. He testified:

"I had consented to the removal of a part of the surface soil, but below what we agreed upon I claim is an unwarranted interference."

Whether the earth was excavated to a greater depth than eight inches was a disputed question of fact.

In so far as this work was authorized and assented to by the plaintiff, he is now estopped to complain. No grade had been established, and therefore plaintiff could not recover damages against the municipality. *Cummings* v. *Dixon*, 139 Mich. 269.

The main complaint is that parol testimony of the action of the common council was allowed. Parol evidence is not admissible to contradict the record of the proceedings of the common council. It is admissible, however, to show facts omitted therefrom. The failure of a clerk to properly enter such proceedings cannot affect the rights of individuals who have acted upon the faith of the action of the council, in fact duly taken, but not recorded. *Township of Taymouth* v. *Koehler*, 35 Mich. 21.

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Whether there is evidence in this case showing an unrecorded action of the common council within the above-cited decision it is not necessary to determine, as the judgment must be affirmed on another point. The main claim of the defendants is that bills were rendered for this work and were approved by the council. These bills did not specifically state where the work for which they were rendered was done. Under the above authorities it was competent to show by parol that the bills included this work, and that they were approved by the council with knowledge of that fact. Such testimony did not contradict the record, but only explained it. What the common council could originally authorize they could subsequently ratify. The allowance of the bills was a sufficient ratification. *Davis* v. *Mayor, etc., of Jackson*, 61 Mich. 530.

The court instructed the jury that—

"The defense claims that, as the work progressed after it was completed, the common council had knowledge of what was being done, and that they afterward ratified what had been done. Now that is a question of fact for you. If the council, subsequent to the completion of the work, ratified the action of the commissioner and the committee and the president, that would be a complete defense. * * * If, as I say, they had knowledge, as a body, of the work progressing, and then deliberately paid the bills understandingly, that would be evidence which goes to you upon the question as to whether the council had ratified and accepted and adopted the work of the commissioner and approved of it."

The fact of ratification was conclusively established, and the court might properly have directed a verdict upon this ground. It therefore becomes unnecessary to discuss other alleged errors.

Judgment affirmed.

McALVAY, C. J., and CARPENTER, BLAIR, and HOOKER, JJ., concurred.

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WISNER v. WISNER.

DIVORCE—CRUELTY—NONSUPPORT—EVIDENCE—SUFFICIENCY.

On a bill by a wife for divorce on the grounds of cruelty and nonsupport, evidence examined, and *held*, insufficient on either ground to support a decree.

Appeal from Wayne; Rohnert, J. Submitted June 18, 1907. (Docket No. 125.) Decided July 15, 1907.

Bill by Anne Eliza Wisner against Ralph E. Wisner for a divorce. From a decree for complainant, defendant appeals. Reversed, and bill dismissed.

Rufus G. Lathrop, for complainant.

Joseph R. Nolan, for defendant.

MOORE, J. This is a bill for divorce upon the ground of extreme cruelty. The defendant appeared and answered the bill of complaint. He denied most of the averments, and set up an explanation of some of the others. Proofs were taken. At the time of settling the decree proposed by the solicitor for complainant, defendant objected for the following, among other, reasons:

(1) That the proofs utterly fail to make out a case on the ground of extreme cruelty.

(2) That the bill of complaint does not allege a cause of divorce for nonsupport under 3 Comp. Laws, § 8622.

(3) That the court was without authority to decree permanent alimony, as there was nothing in the bill of complaint to indicate that property interests were involved, and no subpœna with an underwriting to that effect served on defendant.

The circuit judge overruled the objections and granted a decree of divorce and for alimony. The case is brought here by appeal.

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Did the proofs make out a case of extreme cruelty? The cruelty alleged is that defendant is a confirmed gambler; that he stayed away from home nights, visiting gambling houses; that he left complainant and her child for long periods without money or means to satisfy their needs; that defendant took complainant's money, and pawned her jewelry, and lost the same gambling; that he has utterly failed and neglected to provide complainant with many of the necessities of life.

The record discloses that the parties were married in October, 1902. A child was born to them, who is now nearly four years old. At the time of their marriage defendant gambled some, and that fact was known to his wife. The habit grew upon him, so that he neglected his business. He used some of complainant's money, and pawned some of her jewelry, to indulge his taste for gambling. The wife sometimes knew he did this, and we think the record discloses that she did not wholly disapprove of it. They continued to live together until the summer of 1905, when defendant went to New Mexico to commence life anew. We think the record fairly discloses that, during the last year the parties lived together, defendant did no gambling, except in his own house or in the houses of his friends, in parties planned by his wife or those given in return for parties planned by her. In these games the complainant and her lady friends joined, and the amounts at stake were trifling. The complainant says she planned these parties to keep her husband away from gambling resorts. Defendant says his going to New Mexico was mutually agreed upon, and that his wife was to follow him when he sent for her; that he did send for her, and sent her money to come; and that she declined to come. The amount of money sent was $55. The defendant says that would have been ample. It was shown by a railroad ticket agent in Detroit that the railroad fare and sleeping berth would cost $50.80, and the trip would take 48 hours if the trains made connection, and the solicitor for complainant argues that the sum

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sent was not enough. The complainant telegraphed her husband, "Have decided not to come," but did not suggest that the reason why was because he had not sent her money enough. The testimony of the complainant shows she was friendly with her husband when he went to New Mexico, and accompanied him to the train. It was arranged that she and the child should stay with defendant's father and mother while he was establishing himself in New Mexico.

On the cross-examination of complainant the following occurred:

"*Q.* Your sister resides out there?
"*A.* Yes, sir.
"*Q.* Wasn't it understood that you were going to Raton and make a home there?
"*A.* No, sir.
"*Q.* How did you come to send him that telegram, 'I have decided not to come?'
"*A.* I said I would consider going down there if he sent me the money and returned my diamond ring, and he failed to do that later on.
"*Q.* You did send him the telegram, 'I have decided not to come?'
"*A.* Yes, sir.
"*Q.* And before that you had agreed to meet him at Raton?
"*A.* Only under two conditions.
"*Q.* And there was nothing to it about that?
"*A.* Yes, sir.
"*Q.* What were the conditions?
"*A.* He did not return me my diamond ring, and he did not give me enough money to come."

In addition to this, she stated that she did not want to take the chances of going so far until she knew her husband could take care of her. The husband claims he was able to take care of her, and would have been glad to do so if she had come to him, and would be glad to support her now if she would live with him.

We have already spoken of the fact that she did not suggest to him he had not sent her money enough to pay

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her railroad fare. It is claimed he did not send her money enough to care for her and the child, either before he went to New Mexico or afterwards, and that after he went to New Mexico her brother supported complainant. Whatever may have been the derelictions of defendant before he went to New Mexico, it is clear complainant did not regard them as causes for not living with him, and made no suggestion that she intended to leave him. It is a fair inference from the testimony that she intended to join him in New Mexico, and we have no doubt, had she written him, when she sent the telegram before mentioned, that he had not sent her money enough to enable her and her child to come in comfort, that he would have sent her more.

Mr. Wisner went to New Mexico in June, 1905. October 14th of the same year Mrs. Wisner telegraphed him, "Have decided not to come." She filed her bill of complaint in 1906. It is urged as a ground of cruelty that Mr. Wisner sent his wife but $55 after he went to New Mexico. It already appears for what purpose the $55 was sent. The record fails to show that Mrs. Wisner asked him to send her more money. It also fails to show a condition of affairs that amounts to extreme cruelty or nonsupport in the eyes of the law. It is not necessary to discuss the other propositions.

The decree is reversed, and bill dismissed, but without costs.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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TIMM v. COMMON COUNCIL OF THE VILLAGE OF CALEDONIA STATION.

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1. MUNICIPAL CORPORATIONS — INTOXICATING LIQUORS — REGULATION—CHARTER POWERS—SALOON LIMITS.
   Where the power to regulate and prescribe the location of saloons is expressly given to a municipality, an ordinance fixing a saloon district is a valid exercise of the power.

2. SAME.
   Charter power to a municipality to "suppress" saloons does not authorize an ordinance establishing saloon limits.

3. SAME—ORDINANCES—VALIDITY—PRESUMPTIONS.
   A grave doubt as to the power of a municipality to pass an ordinance should be resolved against the existence of the power and the ordinance declared invalid.

4. INTOXICATING LIQUORS—VILLAGES—ORDINANCES—ESTABLISHING SALOON LIMITS.
   A village organized under the general village law (chapter 87, 1 Comp Laws) has no power to establish saloon limits and prohibit the sale of liquors outside such limits.

Certiorari to Kent; Perkins, J Submitted June 18, 1907. (Calendar No. 22,285.) Decided July 15, 1907.

Mandamus by John C. Timm to compel the common council of the village of Caledonia Station to approve a liquor bond. There was an order granting the writ, and respondent brings certiorari. Affirmed.

Carroll & Nichols, for relator.

Dunham & Dunham (*E. J. Adams*, of counsel), for respondent.

OSTRANDER, J. The relator, Timm, desires to engage in the business of selling at retail intoxicating liquors in the village of Caledonia Station. He was refused the privilege, because the place of business designated is out-

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side of a saloon district fixed by ordinance. He complains of an attempted abridgment of his right under the general law to engage in the business by an ordinance alleged by him to be void.

The questions presented in argument are: *First*, whether the council of a village organized under the provisions of chapter 87, 1 Comp. Laws, with power to pass ordinances "to suppress saloons for the sale of spirituous and intoxicating liquors," may by ordinance fix a saloon district within the village and prohibit the carrying on of the business at any place outside of the district; *second*, if the power exists, whether the particular ordinance is reasonable.

The village of Caledonia Station has about 500 inhabitants. It has a hotel, which is within the saloon district, in which liquors are sold. It has power "to regulate, license, or suppress" billiard tables, "to suppress" gaming, "to regulate and license" public shows, "to regulate or prohibit" sales of property at auction, "to prohibit and suppress" disorderly houses, "to regulate or prohibit" bathing in rivers, "to regulate or prohibit" the selling and storing of combustibles, and finally, "to adopt such other ordinances and make such other regulations for the safety and good government of the village and the general welfare of its inhabitants as are not inconsistent with the general laws of this State." It will be noticed that the terms "prohibit" and "suppress" are sometimes used in the statute in a manner indicative of the idea that they are not interchangeable or synonymous, and that in respect to some matters there is conferred power to regulate *or* prohibit. Strictly, the word "prohibit" means to forbid or interdict by authority, hinder, debar, prevent; the word "suppress," to subdue, overpower, quell, crush, stamp out. In the matter here presented, the words can have but one and the same meaning. Where the power to regulate and prescribe the location of saloons is expressly given to a municipality, an ordinance fixing a saloon district is a valid exercise of

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the power. *Johnson* v. *Bessemer Common Council*, 143 Mich. 313; *Sherlock* v. *Stuart*, 96 Mich. 193 (21 L. R. A. 580). So the power in question here may be exercised to suppress—that is, prohibit—saloons. *Rattenbury* v. *Village of Northville*, 122 Mich. 158; *Post* v. *Village of Sparta*, 58 Mich. 212. That the power to regulate is not power to prohibit has been many times decided (Black on Intoxicating Liquors, § 227, note 56), and it is admitted by counsel for the village that the power to suppress or prohibit is not power to license or regulate. The contention is that power to suppress the business in the village is power to suppress it in a part of the village; that the power to prohibit entirely implies and includes the power to prohibit some—to partly prohibit.

This contention, although apparently plausible, cannot, in my judgment, be maintained. I am satisfied that the legislative intention is to give to villages the option to wholly interdict and prohibit the business within municipal boundaries. If they do not act at all, the business may be carried on in the village under the regulations and the restraints imposed by general laws. There is not an option to both permit and suppress. The village is a legal entity, and the influence of its ordinances is confined to its physical boundaries. Anything less than entire suppression, within these boundaries, is not suppression, is not prohibition of the saloon, but is, in fact, mere regulation and restraint. Significance is to be given to the fact that as to certain subjects the power is given to regulate *or* prohibit, as to others the power to regulate only, and as to saloons the power to suppress. This specific enumeration of powers is indicative of an intention to differentiate, and to withhold the power not enumerated. *State* v. *Fay*, 44 N. J. Law, 476.

It seems to me that counsel for the village impliedly admi these propositions when they concede that the reasonablenes ot the ordinance is for judicial determination. The reasonableness of an ordinance of this village which prohibited all saloons would not be debatable. If the

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power to prohibit saloons in the whole village may be exercised by prohibiting them in a part of the village, I can conceive of no legal bounds to its exercise. They may be suppressed in every place, except a single building or a vacant lot, and may be permitted to exist in every place, except in a single locality. If a city possessing no express power to suppress saloons, but having express power to fix a saloon district, does fix such a district, the reasonableness of the ordinance is open to judicial inquiry. The reason for fixing such a district, in any municipality, is a single one. The result of fixing the district is, in all cases, suppression of the traffic in other districts. And partial suppression of saloons, within the meaning of the term which counsel for the village assert to be the statute meaning, may be accomplished in many ways besides the one of fixing a saloon district.

An ordinance imposing a large license fee would probably result in suppressing all saloons in this village. No one will contend that such an ordinance could be sustained as an exercise of the power to suppress saloons.

If it were matter merely of grave doubt whether the power to pass this ordinance exists, the application of the rule that the doubt should be resolved against the existence of the power (McQuillin on Municipal Ordinances, § 48, and note) would operate to avoid the ordinance.

The court below reached a right result, and the order of that court is affirmed.

McALVAY, C. J., and CARPENTER, HOOKER, and MOORE, JJ., concurred.

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HOLMES v. SMITH.

1. APPEAL AND ERROR—REVIEW—QUESTIONS CONSIDERED—RECORD—MATTERS NOT PRESENTED BELOW.
   Matters not contained in the bill of exceptions, and matters not presented in the court below, will not be considered by this court on error.

2. ESTOPPEL—TITLE TO PROPERTY—FAILURE TO ASSERT—QUESTION FOR JURY.
   Where plaintiff in trover contends that she asserted her title to the property in suit when the chattel mortgage upon which it was seized was given by her husband and refused to execute it; that she again asserted her title when the officer attempted to take the property under the mortgage, and did not allow him to take it until it was replevied, the question whether she is estopped to claim the property by her silence is for the jury under proper instructions, her testimony being contradicted.

3. ELECTION OF REMEDIES—ASSUMPSIT—WAIVER OF TORT—PREMATURE ACTION.
   The bringing of an action of assumpsit, waiving tort, under section 10421, 3 Comp. Laws, after plaintiff's property has been seized on a writ of replevin, is not an election of remedy barring a subsequent action of trover for the same property, where, at the time of bringing the action of assumpsit, the defendant had not sold the property and therefore had not converted it.

Error to Kent; Perkins, J. Submitted June 19, 1907. (Docket No. 20.) Decided July 15, 1907.

Trover by Ellen Holmes against Emma Smith. There was judgment for plaintiff, and defendant brings error. Affirmed.

Thompson & Temple, for appellant.

Holmes & Holmes, for appellee.

MOORE, J. This is an action in trover brought for the

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value of live stock and other personal property which plaintiff claims she owned, and alleges defendant improperly converted. The case was tried before a jury, which rendered a verdict in favor of the plaintiff. The case is brought here by writ of error.

Counsel for appellant argue several matters which are not contained in the bill of exceptions. They also argue for some propositions not presented in the court below. As to these arguments, they will not be considered upon this record. We have examined the assignments of error in relation to the admissions of testimony, and find no reversible error therein.

The plaintiff in this suit is a married woman who, in November, 1904, lived with her husband on a rented farm. The husband was in debt for rent. A chattel mortgage was drawn, the beginning of which reads as follows:

"Know all men by these presents, that George Holmes and Ellen Holmes, his wife, of the township of Walker, Kent county, Mich., of the first part, being justly indebted unto Emma Smith, of Saratoga Springs, N. Y., of the second part, in the sum of two hundred thirty-seven dollars, have, for the purpose of securing payment of said debt," etc.

The mortgage was in the usual form and described live stock and other property. It was not drawn in the presence of Mrs. Holmes. After Mr. Holmes signed it, the mortgage was taken to Mrs. Holmes for her signature. She declined to sign it, and stated to the agent of the mortgagee that she was the sole owner of some of the property, and joint owner of other of the property described therein. Later, the mortgage was given for foreclosure to an officer who made a demand for the property. His demand was refused. There is a conflict in the testimony as to what occurred. The officer says Mrs. Holmes made claim only to the road wagon. She contends that she made claim to the property generally. The officer not succeeding in getting the property upon his demand,

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it was obtained by suing out a writ of replevin, and later was sold upon the chattel mortgage. After the property was taken from the possession of Mr. and Mrs. Holmes, Mrs. Holmes sued Mrs. Smith in assumpsit. After the testimony was all in, but before the case had been submitted, the plaintiff discontinued this suit. Later she brought this action.

Two important questions are involved in the case. The first one is whether plaintiff is estopped because she failed to speak and assert title to the property when she ought to have spoken. Counsel for appellant say she made no claim to the officer of any interest in any of the property, except the road wagon, and the case is directly within *Zuehlke* v. *Stone*, 148 Mich. 478. We cannot agree with the counsel in this contention. Plaintiff contends she asserted title to the property when the chattel mortgage was given; that she again asserted it when the officer attempted to get the property upon the chattel mortgage, and did not allow him to take it until it was replevined. As before stated, the testimony was contradictory as to what occurred. This raised a question of fact for the jury, under proper instructions, as to the law of estoppel, which were given at length and correctly by the trial judge.

This brings us to the next important question, which is whether, by bringing assumpsit, which suit was discontinued without judgment, plaintiff made an election which would prevent her from afterwards bringing trover. Counsel say:

"The plaintiff had an action in tort or assumpsit. She waived her tort and brought assumpsit, and, having so elected, cannot, at this time, maintain this action of tort, when she had so elected to sue in assumpsit"—and cite many cases.

The officer took the property from the Holmes December 21, 1905. Mrs. Holmes commenced her suit in assumpsit on the same day. The property was sold December 28, 1905. The assumpsit case was brought under the

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provisions of section 10421, 3 Comp. Laws. It was the claim of counsel that the action had been prematurely brought, as there had not been any sale of the property, and that assumpsit could not be maintained under the statute. The case was dismissed, and, as before stated, this proceeding was commenced. At the time of the first suit, the property was in the hands of the officer. The defendant in this case was not then guilty of a tort which might be waived. Justice HOOKER, speaking for the court, in *McLaughlin* v. *Austin*, 104 Mich. 491, after stating the general rule of the election of remedies, said:

"This rule is not inconsistent with the practice of bringing a second and different action, where it appears that the plaintiff never had a right of action as first brought, and therefore could not have elected. There is a difference between an election of remedies and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions upon which recovery could not be had."

This case is cited with approval in *Chaddock* v. *Tabor*, 115 Mich. 33; *Bryant* v. *Kenyon*, 123 Mich. 151; *Shanahan* v. *Coburn*, 128 Mich. 692; *First Nat. Bank of Reed City* v. *Sweet*, 136 Mich. 615; *Wilson* v. *Knapp*, 143 Mich. 67.

Chief Justice MONTGOMERY, in *Bryant* v. *Kenyon*, 123 Mich. 154, used the following language:

"The important question is the one determined by the circuit court, i. e.: Did the plaintiff, by bringing the action of assumpsit, waive the tort, and elect to treat the title of all of this wood as having passed to defendant? It is to be noted that, as to the wood then unsold and in defendant's hands, no tort had been committed for the defendant to waive. It is clear, therefore, that the action of assumpsit could not have waived such a tort."

The court further says in the same case:

"The election to waive such torts as had been committed was not an election to waive any tort which the defendant might commit in the future. Was the ineffect-

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ual attempt to recover in assumpsit a sum not due a waiver of a future tort? We think not."

See, also, *Kinney* v. *Kiernan*, 49 N. Y. 164; *In re Van Norman*, 41 Minn. 494; *Redhead* v. *Investment Co.*, 126 Iowa, 410.

The case was tried with a good deal of care by the circuit judge, and was submitted to the jury in an excellent charge.

Judgment is affirmed.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

MESSMORE v. MAERZ.

MORTGAGES—DISCHARGE—MISTAKE—INNOCENT PURCHASER—RIGHT TO FORECLOSE.

After complainant had discharged a mortgage on certain land by reason of a misunderstanding of the direction of a subsequent grantee of the land, the land was conveyed to defendant by a clear warranty deed, defendant giving a purchase money mortgage. Defendant and his grantor afterwards procured through complainant on a new mortgage money to pay the purchase money mortgage, complainant at the time procuring an abstract and assuring them that the title was clear. *Held*, that complainant was not entitled to foreclose the mortgage discharged through mistake, defendant never having assumed it or known of it.

Appeal from Sanilac; Beach, J. Submitted June 19, 1907. (Docket No. 115.) Decided July 15, 1907.

Bill by Charles L. Messmore against John Maerz and

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others to correct a description in a mortgage, and to foreclose the same. From a decree dismissing the bill, complainant appeals. Affirmed.

W. H. Burgess, for complainant.

F. S. Viets, for defendants Maerz.

MOORE, J. The bill is filed in this case to correct the description in a mortgage and to foreclose the same. The case was heard in open court. The circuit judge dismissed the bill. The case is brought here by appeal.

The mortgage in controversy was given by John Callaghan December 2, 1889, to the complainant, to secure the payment of a note for $150 and interest thereon, due October 1, 1890, upon the southwest quarter of section 30, in township 14 north, range 16 east, and was duly recorded. In March, 1890, this and other mortgages were assigned as collateral security to the People's Savings Bank of Detroit. March 26, 1890, John Callaghan conveyed said land, by warranty deed, to Henry Varty, for a consideration stated in the deed of $2,900, which deed contains the following recital:

"Subject to a mortgage of eight hundred dollars held by Wm. Varty and a mortgage of one hundred and sixty dollars held by Charles Messmore."

This deed was recorded March 28, 1890. April 3, 1891, Henry Varty and wife conveyed the south half of above-described land back to John Callaghan, by warranty deed, containing the recital: "except a mortgage of $700." This deed was recorded August 1, 1891. December 19, 1891, Henry Varty and wife conveyed the north half of above-described quarter section of land to defendant John Maerz by clear warranty deed. Maerz gave Varty a mortgage for $500 on 40 acres of this land, and sold the other 40 in February, 1892. In September, 1895, Maerz, for the purpose of paying the mortgage he had given to Varty, procured a loan through complainant of Miss Dick-

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inson, which loan was secured by a mortgage. At this time an abstract of title was obtained by Messmore, for Maerz, and Messmore assured Varty and Maerz that the title was all right. In 1893 Mr. Messmore received a paper reading as follows:

"August 3, 1893.

"*Mr. Messmore:* Please discharge the mortgage and charge it to me.

"HENRY VARTY."

He says he supposed this referred to the real estate mortgage, and that he procured a discharge thereof from the Detroit Bank, and charged the amount of the mortgage to Varty, and that he had no knowledge that the mortgage was not properly discharged at the time the Miss Dickinson mortgage was given by Maerz. He also claims that Varty afterwards denied that the paper referred to the real estate mortgage, and that there was litigation as the result thereof, which culminated in *Varty* v. *Messmore*, 132 Mich. 314. It is his further claim that he has never been paid for said mortgage, and, though it has been discharged of record, that it should be reinstated. He further claims that a mistake was made in drawing the mortgage originally by inserting the wrong range, which mistake he seeks to have corrected in this proceeding. It is the claim of the solicitor for complainant that defendant Maerz should be held because, and we quote from the brief:

"Maerz took title of his land from Henry Varty December 19, 1891, by clear warranty deed. Varty had received title from John Callaghan March 26, 1890, by warranty deed, subject to a mortgage to Charles L. Messmore of $160, which deed was recorded March 28, 1890. The mortgage mentioned in this deed to Varty is the one complainant now seeks to foreclose. In this deed to Varty, Callaghan inserted a recital of the mortgages against the land, naming the mortgagees, one of whom was complainant."

We have already recited enough from the record to show that in the deed to Maerz there was no reference

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made to the Messmore mortgage, and that the grantor of Maerz gave him a clear warranty deed, and that a purchase price mortgage was given back by him to Varty for $500. Later Varty and Maerz, for the purpose of getting money to pay off this purchase price mortgage, went to Messmore, who insisted upon an abstract of title being furnished. It was furnished, and Messmore declared the title to be good, and Maerz, through Messmore, procured the money to pay off his purchase price mortgage, and lost any opportunity to say to his grantor that his title was defective and must be made good. It does not appear that Maerz ever knew of the existence of the Messmore mortgage. Messmore, of course, knew it. He had procured its discharge. It was discharged of record when he procured the abstract for Maerz. We think there is no equity in saying that Mr. Maerz, who had no actual knowledge of complainant's mortgage, and who had never assumed it, should be required to pay it because complainant, through mistake, caused it to be discharged of record. We have no brief on the part of the defendants.

The decree is affirmed, with costs.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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TINKER v. PIPER.

1. QUIETING TITLE—PROPRIETY OF REMEDY—UNOCCUPIED LAND—DEFENDANT IN POSSESSION—EJECTMENT.

On a bill to quiet title, filed under section 448, 1 Comp. Laws, evidence examined, and *held*, to clearly show that defendant was not out of possession of the land in controversy, and that to settle the rights of the parties ejectment should have been brought.

2. APPEAL AND ERROR — CHANCERY APPEALS — SETTLEMENT OF CASE—TIME—STATUTE—COURT RULES—CONSTRUCTION.

Act No. 129, Pub. Acts 1905, does not limit the time for settling a chancery case for appeal to the time limited by Circuit Court Rule No. 47. *Nolan* v. *Garrison*, ante, 56, followed.

Appeal from Lapeer; Smith, J. Submitted June 20, 1907. (Docket No. 82.) Decided July 15, 1907.

Bill by Effie M. Tinker against Peter N. Piper to quiet title to land. From a decree for complainant, defendant appeals. Reversed, and bill dismissed.

W. E. Brown, for complainant.

Stickney & Reed, for defendant.

MOORE, J. This case is an appeal from the circuit court for the county of Lapeer, in chancery. The bill was filed to quiet title to the west half of the southeast quarter of section 14, township of Elba, Lapeer county, Mich. The defendant answered and claimed title under a tax deed and by adverse possession for more than the statutory period. The proofs were taken in open court, and a decree entered in favor of complainant, as prayed for in her bill.

The defendant alleges as error that a bill to quiet title will not lie against a party in possession claiming ownership; ejectment being the only proper remedy in such a case.

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Counsel for appellant state this is the only error for which the appellant asks to have the decree reversed. The complainant claims the right to maintain this action by virtue of section 448, 1 Comp. Laws, which reads in part as follows:

"Any person claiming the legal or equitable title to lands, whether in possession or not, may institute a suit in chancery against any other person, not in possession, setting up a claim thereto in opposition to the title claimed by the complainant," etc.

It will be observed an important question is whether defendant was not in possession within the meaning of the statute. The circuit judge filed a written opinion, the opening part of which reads as follows:

"There is some reason for saying that the bill should have been dismissed, as was done in *Seymour* v. *Rood*, 121 Mich. 173, because defendant, Piper, considers himself in possession of a portion at least of the premises in controversy; but the bill is here, and the money value involved is not large, so it is thought better to dispose of the case on its merits."

Later in the opinion, he uses the following language:

"There is no question but that since March, 1889, Piper has had a species of possession of the one acre of land, for much, if not all, of the time. He set out hitching posts for the use of the public who came to the lake. He led his horses to water across it at one point. He landed and tied his row boats along the shore. There being no fence between his own land and this one acre his cattle pastured upon it many times. He once built a calf pen upon it, also a temporary shed for use until his barn was completed; but he never asserted ownership to, nor assumed possession of, the 79 acres in the lake, except to use the surface of the water in common with the public. The one acre was also open to public use, and was used by the public. The several owners of the original title have also since March 29, 1890, had a species of possession. They built and used a boathouse upon it. They also landed and tied their boats to the shore. They drove over it. Gates cut a large tree from it, and rented it for a tent show. Thompson made some use of it. It

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was assessed to them, and they paid the taxes until the last five or six years. There was so much contention between Piper and Gates about the ownership and possession that the supervisor finally avoided taking part in it by assessing it as 'owner unknown,' because both Piper and Gates were his neighbors. He never assessed it to Piper until Thompson, a nonresident of his town, acquired the title of Gates."

The land in controversy is mostly lake. It adjoins land which has been undisputably owned by defendant for years. There is one acre of land which is not submerged. The only way it is reached by the public is through a long lane leading from the highway, over land owned by defendant and used by him as a farm, to land surrounding a summer hotel and used in connection therewith, which summer hotel is owned by the defendant.

It was the claim of defendant upon the trial that he had a tax title, and has acquired the land by adverse user, and he gave some testimony tending to prove his claim. The testimony is undisputed that at the time the suit was commenced defendant's cattle pastured upon the acre in question; that he had thereon many hitching posts, some of which had been there for years, which were used by guests of the hotel and patrons of defendant's boats to hitch their horses. That defendant led his horses daily across the land to water; that guests of the hotel passed over the land daily during the swimming season to reach the swimming hole. It was the claim of defendant that he had the right, as owner of the land, to do the things he did and which he permitted his guests to do. It is true there is a contest as to the extent of the use made by the respective parties; but we think it very clear that defendant was not out of possession of the land in controversy, and that to settle the rights of the parties ejectment should have been brought. The case is within *Seymour* v. *Rood*, 121 Mich. 173; *Chandler* v. *Graham*, 123 Mich. 327; *Crosby* v. *Hutchinson*, 126 Mich. 56.

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One other question remains. The solicitor claims the case is not properly here,—

"Because no steps were taken to perfect such appeal within the time allowed by Circuit Court Rule 47 and said Act No. 129, Pub. Acts 1905, and not until on or about the 10th day of October, A. D. 1906, did defendants give notice of a settlement of the case to be presented to the court on October 20th; * * * because the court had no jurisdiction to enter an order on August 20th extending the time to settle the case, and the court had lost jurisdiction to extend the time at said date."

Act No. 129, Pub. Acts 1905, has been construed against the contention of the solicitor for complainant in the recent case of *Nolan* v. *Garrison*, ante, 56.

The decree is reversed, and one may be entered here dismissing the bill, with costs of both courts.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

TREND *v.* DETROIT UNITED RAILWAY.

1. MASTER AND SERVANT — PERSONAL INJURIES — FELLOW-SERVANTS—INCOMPETENT SERVANT—NEGLIGENCE—TRIAL — INSTRUCTIONS.

Where, in an action by a servant against an electric railway company for injuries caused by being struck by a car operated by an incompetent motorman, the only ground upon which recovery could be based was the negligence of defendant in retaining the incompetent servant in its employ with knowledge of his incompetence, it was error to instruct that the jury might fully consider the other claims of negligence in determining whether defendant retained in its employ an incompetent motorman whose negligence caused the injury.

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2. SAME—EVIDENCE—BOOKS—ADMISSIBILITY.
Books kept by defendant showing the records of conductors and motormen, and containing entries as to the alleged incompetent motorman, are admissible in evidence as to his record, not only for the purpose of showing notice to the company of his record, but also as prima facie evidence of any facts stated therein, and plaintiff is not limited in his use of the books to specific acts of incompetency otherwise shown, except as he may have limited himself by his declaration.

3. SAME—DEFENSES—DEMANDS OF UNION.
Whether a servant suing his master for a personal injury caused by the negligence of an incompetent fellow-servant is estopped to rely on the negligence of the master in retaining such servant in his employ by the fact that such retention was due to the demands of a union of which plaintiff was a member, will not be decided on a record which does not show the agreement between the defendant and the union.

Error to Oakland; Smith, J. Submitted June 21, 1907. (Docket No. 75.) Decided July 15, 1907.

Case by Jacob A. Trend against the Detroit United Railway for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Brennan, Donnelly & Van De Mark and *James H. Lynch*, for appellant.

Andrew L. Moore, for appellee.

BLAIR, J. Plaintiff, a conductor in the employ of defendant, while in the discharge of his duties as such conductor, was struck and seriously injured by a car operated by another employé of defendant, a motorman by the name of Dillon, operating said car upon an adjacent parallel track. There was evidence tending to show that Dillon operated his car negligently, that he was incompetent to perform the duties of his position, and that defendant had notice of such incompetence. Plaintiff recovered a verdict, and defendant has brought the record

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to this court for review. The points of error relied upon by appellant for a reversal are the following:

"1. The injury of which the plaintiff in this case complains was due to an accident, which was one of the risks which he assumed when he entered the employ of the company.

"2. Assuming for the sake of argument that the plaintiff did not assume the risk by virtue of his employment, then under his own testimony he was guilty of contributory negligence.

"3. Since the injury was inflicted by a car operated by motorman Dillon, who was a fellow-servant of plaintiff, plaintiff cannot recover, even though Dillon was negligent. There was error in the admission of testimony as to the alleged incompetency of the motorman, Dillon: (*a*) In the admission of the books of the company. (*b*) In the testimony as to specific acts.

"4. Assuming that Dillon was negligent, his retention in the employ of the company was due to the demands of the union of which plaintiff was a member at that time, and which estops him from setting up the claim of negligence on the part of the company in retaining Dillon in its employ.

"5. The court was in error in giving as a portion of the charge the accumulative claims of the plaintiff."

We are of the opinion that point 5 is well founded. The only ground upon which the plaintiff was entitled to have his case submitted to the jury was that of negligence of an incompetent fellow-servant, of whose incompetence defendant had, or was chargeable with, notice. After stating at length the several claims of plaintiff's counsel as to the acts or omissions of defendant which constituted negligence, the court said:

"It is essential to review all of these claims, because most of them seem to have some bearing in this case either upon the question of whether the viaduct was a safe place to work, or whether the plug was located as it should have been, or whether the company was negligent in not refusing Dillon employment or in retaining Dillon, whether Dillon was a competent or incompetent motorman, and some of them have a bearing on the question as to whether or not the plaintiff himself was guilty of

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contributory negligence. * * * And I might as well say right here that if there was no evidence in this case except the claimed negligent acts of Dillon in running his car carelessly or too fast down through the viaduct, if there was no evidence of his incompetency, then it would be plain that the injury would have been caused solely by a fellow-servant, and, of course, one fellow-servant cannot recover from a company for the act of a fellow-servant, especially working in the same kind of employment, in the same class of service that he himself is employed in; but I have rehearsed these various claims, gentlemen, and they are full of your consideration."

Holding, as we do, that the only negligent acts upon which a recovery could be justified were those of Dillon, it was error to instruct the jury that they might fully consider the other claims of negligence in determining the question whether the defendant retained in its employ an incompetent motorman whose negligence caused the accident.

The books referred to under point 3 were books kept by defendant containing the records of conductors and motormen, and contained entries as to motorman Dillon. The defendant was chargeable with notice of the entries contained in the books, and the record of Dillon was admissible, not only for the purpose of showing notice to the company of the record, but also as prima facie evidence of any facts stated therein, and plaintiff was not limited in his use of the books to specific acts of incompetency otherwise shown, except as he may have limited himself by his declaration. Furthermore, it is practically conceded by counsel for defendant, in their principal brief, that defendant recognized the incompetency of Dillon, and would not have taken him again into his employ after his discharge, except for the demands of the union.

"The contention of the defendant company is this: That the continuance of Dillon in the employment of the company, after the accident in September, 1902, was due solely to the demands and insistence of the organization of which the plaintiff at that time was a member and

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continued to be until the time of the accident in question."

In support of their contention under point 4, counsel for defendant cite *Farmer* v. *Kearney*, 115 La. 722 (3 L. R. A. [N. S.] 1105). In view of our conclusion that a new trial must be had, for the reason above stated, we do not feel inclined to consider this important contention upon the record before us. While it appears from the record that some kind of an agreement existed between defendant and the union to which plaintiff belonged, whereby the "business agent" of the union had some voice in determining whether a member should be discharged, the entire agreement is not before us. According to the statements of counsel upon the oral argument, important provisions of the agreement, such as provisions for arbitration in case of disagreement between the business agent of the union and the defendant's officers, are not contained in this record. We, therefore, must decline to consider the question presented until it comes before us upon a record fully presenting the agreement between the defendant and the union.

The question of contributory negligence was for the jury, and the court did not err in so holding.

Judgment reversed, and a new trial granted.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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KELLEY v. SECRETARY OF STATE.

1. STATE LEGISLATURE—PROCEDURE — RESOLUTIONS — STATUTES—HOW PASSED.

   A resolution of the legislature requiring the secretary of State to take the necessary steps to submit to the electors of the State a question to be voted upon at a special election called for another purpose is legislation which might be accomplished by bill or joint resolution and therefore requires the votes of a majority of all the members elected to each house (Const. art. 4, § 19), notwithstanding it is denominated a "concurrent" resolution by the legislature.

2. STATUTES—PASSAGE—PROCEDURE—CONSTITUTIONAL PROVISIONS—THE VOTE—POWER OF LIEUTENANT GOVERNOR.

   Section 19 of article 4 of the Constitution requires that at least 17 senators must concur in passing a bill or joint resolution before it can become a law; section 14 of article 5, empowering the lieutenant governor to give the casting vote in cases of an equal division of the senate, being applicable only to resolutions not having the force of laws, assuming that there are such.

3. CONSTITUTIONAL LAW—RIGHT TO INSTRUCT REPRESENTATIVES—CONSTRUCTION OF PROVISION.

   Section 10 of article 18 of the Constitution, providing that the people have a right to instruct their representatives, authorizes a plebiscite, if authority be needed, on the question whether the people desire to nominate their candidates for United States senator by direct vote, but has no bearing on the question how the law submitting such question to the people shall be enacted.

Mandamus by Patrick H. Kelley to compel George A. Prescott, secretary of State, to submit a question to the vote of the people as provided by Concurrent Resolution No. 1, Pub. Acts 1907. Submitted July 13, 1907. (Calendar No. 22,389.) Writ denied July 15, 1907.

Rollin H. Person, for relator.

John E. Bird, Attorney General (*Charles W. McGill* and *George S. Law*, of counsel), for respondent.

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CARPENTER, J. Relator, the lieutenant governor of the State, seeks by these proceedings a mandamus compelling respondent, the secretary of State, to take the steps required by him to be taken in the following concurrent (so-called) resolution:

"Resolved by the senate (the house of representatives concurring) that there shall be submitted to the people of the State of Michigan at the election to be held on the seventeenth day of September, nineteen hundred seven, for choosing delegates to the constitutional convention, the question of nomination by direct vote of the qualified electors of the State, of the United States senator, governor and lieutenant governor, the candidate of any party receiving the highest number of votes of such party for either of said offices, to be the candidate for such party for such office, and the secretary of State is hereby required to certify the same to the clerks of the several counties, and give notice of the same to the sheriffs of the several counties of this State, and the sheriffs of the several counties of this State shall be required to give notice of the same to the several townships and wards in said State, in the manner required by law, and the said question shall be printed upon a separate ballot used at said election, as follows (we omit the description of the method of printing).

"Such ballots so prepared shall be sent out by the board of election commissioners at the same time as the ballots to be used at said election.

"All votes cast on said question shall be taken, counted, canvassed and returned as provided by law for the election of State officers." Concurrent Resolution No. 1, Pub. Acts 1907.

This resolution was duly passed by the house of representatives. In the senate—consisting of 32 members—16 senators voted for it, and 16 voted against it. Thereupon the president of the senate, lieutenant governor, the relator, voted for the resolution and declared it adopted. It received the approval of the governor. Did the lieutenant governor, the president of the senate, have a casting vote on this resolution, and did such vote give it legal effect? is the constitutional question presented by these proceedings. Relator answers this question "Yes." Re-

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spondent, acting under the advice of the attorney general of the State, answers it "No." This question, though important, is not difficult to determine. We are therefore able, as the exigency of the case demands, to determine it the second day after its submission.

In the judgment of the court, this issue is to be determined by that portion of section 19 of article 4 which reads as follows:

"No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house."

As a majority of the members elected to the senate—for concededly the lieutenant governor was not one of those members—did not vote for this resolution, it is not effective unless one or the other of the two following propositions can be maintained: *First*, that the resolution in question is not a bill or joint resolution within the meaning of the constitutional provision above referred to; *second*, that in case of an equal division of the senate a bill or joint resolution may become a law by the casting vote of the lieutenant governor, the president of the senate. We will consider separately each of these propositions.

First. Is the resolution in question a bill or joint resolution, within the meaning of the constitutional provision:

"No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house"?

This language, according to sound principles of constitutional construction, applies to all laws which might be effected by the passage of a bill or the adoption of a joint resolution. Otherwise legislators might, at their pleasure, disregard its prohibition by calling the bill or joint resolution by some other name. It is therefore unimportant that the resolution in question is called a concurrent resolution. It is none the less a bill or joint resolution within the meaning of section 19 of article 4, if, assuming it to

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be valid, it is a law which might have been effected by the passage of a bill, or the adoption of a joint resolution. That the object of this resolution might have been so effected—that is, by the passage of a bill or the adoption of a joint resolution—is apparent and obvious. It certainly would have been competent for the legislature to have effected its object by the passage of a bill. Had it done so, we apprehend that no one would have claimed that its action was illegal or improper, because it had not called such a resolution a concurrent resolution. But it is contended that the resolution, assuming it to be effective, is not a law within the meaning of section 19 of article 4. The ground upon which this contention rests is that its object is to gather information to be used only in enacting subsequent laws. But the resolution, if effective, is none the less a law. It is a law for the procurement of such information. If effective, it imposes legal duties upon the secretary of State (and, if it did not, relator is not entitled to relief), upon the clerks, sheriffs, and board of election commissioners of the several counties of the State, and upon all the canvassing boards in the State. It undertakes—and, if effective, it succeeds in that undertaking—to provide a legal election not otherwise provided for, and to surround the same with all the safeguards of law. It follows from this reasoning that, in our judgment, the resolution comes within the provision:

"No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house."

Second. Can a bill or joint resolution become a law by the casting vote of the lieutenant governor without the concurrence of a majority of the members elected to each house? Those who answer this question in the affirmative must and do base their answer upon section 14 of article 5 of the Constitution, which reads as follows:

"The lieutenant governor shall, by virtue of his office, be president of the senate. In committee of the whole he

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may debate all questions; and when there is an equal division he shall give the casting vote."

If the above language qualifies the provision:

"No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house"—

And those who answer the question under discussion in the affirmative must maintain that it does qualify it—some startling consequences result. In that event, *whenever* there is an *equal division* on the passage of a bill, the lieutenant governor, as president of the senate, will have a casting vote, and, if he casts that vote in the affirmative, the bill will become law. No sound argument occurs to us by which it may be held that his right to give that casting vote would be limited to cases where 16 senators vote in the affirmative. If he has it where the vote stands 16 yeas and 16 nays, he would, by the same reasoning, have it when the vote stood 14 yeas and 14 nays. An argument leading to such consequences is not sound. Section 14 of article 5 does not say that the lieutenant governor shall have a casting vote for the purpose of making laws; neither is that the necessary construction to be placed upon its language. The most that can be said is this—that if the provision stood alone it is open to that construction. It is also open to the construction—and this is the construction placed upon it by the attorney general—that the right of the lieutenant governor to give a casting vote is limited to proceedings in the committee of the whole. And it is, perhaps, open to the construction that he also has the right to give the casting vote upon the passage of resolutions which do not have the force of law, if, as relator contends, there are such resolutions. On the other hand, the language of section 19 of article 4,—

"No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house,"

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Is, by no possibility of reasoning, open to the construction that a bill or joint resolution may become a law without the concurrence of said majority. We have then the task of harmonizing two provisions of the Constitution; one of which states explicitly that—

"No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house,"

And another which is open to a contrary construction. By what principle shall we harmonize them? Obviously this—the doubtful language must receive a construction in harmony with that which is not doubtful. Indeed, in such a case a court is called upon to construe the doubtful provision only, for the explicit provision can have but one meaning and is not open to construction. Section 14 of article 5 must therefore receive a construction in harmony with section 19 of article 4, and it cannot be so construed as to permit the lieutenant governor to give a casting vote for the purpose of making a law. Whether his right to give such casting vote is limited to proceedings in committee of the whole, or extends to resolutions, if there be such, which do not have the force of law, is a question which is not before us and which we do not determine. It results from this reasoning that the resolution in question is legally ineffective.

Before concluding this opinion, we deem it our duty to refer to section 10 of article 18 of the Constitution, which is called to our attention by relator. That section reads:

"The people have the right peaceably to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances."

It has no bearing whatever on the legal question involved in this suit. It may afford justification, if justification were otherwise needed, for the enactment of a law like that attempted by the resolution before us; but it is quite sufficient to say that such a law must be enacted in

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accordance with the Constitution. It must receive a concurrence of a majority of all the members elected to each house.

The application for a mandamus is therefore denied.

McALVAY, C. J., and GRANT, BLAIR, MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

FYFE v. KENT COUNTY CLERK.

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OFFICERS—STATE LEGISLATURE—MEMBERS — ELIGIBILITY TO OFFICE—DELEGATE TO CONSTITUTIONAL CONVENTION.

Under section 18, article 4, of the Constitution, a member of the legislature of 1907, which enacted the law providing for the constitutional convention of 1907, is ineligible as a delegate to that convention, election as such delegate being a "civil appointment" from State authority as the quoted words are used in the section cited.

Mandamus by Andrew Fyfe to compel Ralph A. Mosher, clerk of Kent county, to place relator's name on the ballot for primary election as delegate to the constitutional convention. Submitted July 15, 1907. (Calendar No. 22,389½.) Writ denied July 15, 1907.

Kleinhans & Knappen, for relator.

John E. Bird, Attorney General (*Arthur P. Hicks*, of counsel), for respondent.

PER CURIAM. The legislature of 1907 passed an act providing for a convention for the purpose of making a general revision of the Constitution. (Act No. 272, Pub. Acts 1907.) It provides for 96 delegates, consisting of 3

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from each senatorial district. The compensation provided is ten dollars per day. The relator, a senator of the legislature, presented the necessary petition to the respondent to place his name on the ballot for primary election as delegate to the constitutional convention. He declined to place his name on the ballot, upon the ground that he is a member of the present legislature which enacted the law, and is therefore ineligible under the Constitution. Relator applies for the writ of mandamus to compel the respondent to place his name on the ballot. The sole question, therefore, is: Is relator ineligible as a delegate to the constitutional convention?

The constitutional provision (section 18, art. 4) reads as follows:

"No person elected a member of the legislature shall receive any civil appointment within this State, or to the senate of the United States, from the governor, the governor and senate, from the legislature or any other State authority, during the term for which he is elected. All such appointments and all votes given for any person so elected for any such office or appointment shall be void. No member of the legislature shall be interested, directly or indirectly, in any contract with the State or any county thereof, authorized by any law passed during the time for which he is elected, nor for one year thereafter."

It is conceded that delegates to the constitutional convention are State officers. It is held in several decisions that the terms "appointment" and "election" are synonymous terms. This court said, speaking through Justice CHRISTIANCY, in *People* v. *Hurlbut*, 24 Mich. 44:

"The Constitution does not seem to have made any clear distinction between the 'election' and the 'appointment' of officers; and in section 18, art. 4, the terms seem to be used as synonymous, and what is usually or more properly termed the election of a senator is there designated as an appointment."

See, also, *State* v. *Compson*, 34 Or. 25; *McPherson* v. *Blacker*, 146 U. S. 1.

The duties of delegates to the constitutional convention relate exclusively to affairs of State. They have no other

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function to perform than a State function. The only question, therefore, is: Does such an officer receive his appointment or election from any other State authority than the three just previously mentioned? If the framers of the Constitution meant to exclude members of the legislature from eligibility to other State offices, no language could be more comprehensive than that of "any other State authority." These are State officers elected by State authority. They receive a civil appointment from State authority. There are other provisions of the Constitution which show the intention to prevent members of the legislature from holding other civil positions during their term of office. Section 6, art. 4, provides:

"No person holding any office under the United States [or this State] or any county office, except notaries public, officers of the militia and officers elected by townships, shall be eligible to or have a seat in either house of the legislature, and all votes given for any such person shall be void."

The purpose of these provisions is "to preserve a pure public policy," or, as we said in *Ellis* v. *Lennon*, 86 Mich. 468, speaking through Justice MCGRATH, "to prevent officers from using their official position in the creation of offices for themselves or for the appointment of themselves to place."

We are all of the opinion that delegates to the constitutional convention come within the term "civil appointment," as used in this provision of the Constitution, that they receive their appointment from State authority, and therefore that members of the legislature which enacted the law and thus provided for the offices, fixing compensation, etc., are ineligible as delegates. They are both within the spirit and letter of the law.

The writ is denied.

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SIMPSON *v.* CRANE.[1]

1. CONTRACTS—MISREPRESENTATIONS—EVIDENCE—ADMISSIBILITY.
   Where plaintiffs declined to accept an agreement drawn on the basis of certain alleged misrepresentations of their agent to defendants, and proposed a new one which defendants accepted, and which not only was not based upon or obtained by reason of the fraudulent representations, but was independent of, and in effect repudiated them, such new agreement became the entire agreement between the parties, and testimony as to the alleged fraudulent representations was inadmissible to avoid it.

2. SALES—CONTRACTS—GOODS FOR RESALE—BREACH BY SELLER.
   Where a seller of goods for resale fails to perform his contract as to furnishing advertising matter and other aid to making sales, and such failure to perform is not waived, the measure of his damages in an action for the price is the contract price, less such amount of damages as the buyer can show he has suffered by reason of the seller's default.

3. SAME—INFERIOR QUALITY OF GOODS—RECOUPMENT OF DAMAGES.
   Where a buyer of goods receives precisely what he ordered he cannot recoup any damages on account of the inferior quality or efficacy of the goods.

Error to Eaton; Smith, J. Submitted January 9, 1907. (Docket No. 8.) Decided March 5, 1907. Rehearing denied July 15, 1907.

Assumpsit by Henson S. Simpson, George H. Simpson, and T. Scott Simpson, copartners as the Acme Food Company, against William H. Crane and Elmer McGee, copartners as Crane & McGee, on certain promissory notes. There was judgment for defendants, and plaintiffs bring error. Reversed.

Frank A. Dean, for appellants.

Black & Reasoner and *S. B. Roe*, for appellees.

[1] The opinion filed on the original hearing in this case was withheld from publication pending the rehearing.

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BLAIR, J. Plaintiffs instituted suit against defendants by filing a declaration on the common counts in assumpsit with notice that on the trial they would give in evidence three promissory notes, dated November 19, 1903, for $300 each, and payable in four, seven, and ten months, respectively. Attached to each note, the following appeared in print, except the signature:

"We, the undersigned, agree with Crane and McGee, of Millett, State of Michigan, executing above orders as follows: You are expected and instructed to sell said Acme Food strictly on its merits as the guaranty provides, and to warrant and guarantee the said food to each customer if therein fed according to printed directions. And we agree in all cases where your customers have fed the food as aforesaid, and furnish us with their affidavit on printed form furnished by us, to ship to you, free of charge, F. O. B. on cars at your station, as many pounds not exceeding five hundred pounds to a single customer as shall appear by such affidavits to have been used by such customer. It is understood that this warranty shall cover in each case only the first sale made to each individual customer. All blank spaces and such affidavit must be filled in ink before same are executed; and the party executing same must clearly and explicitly state that he has fed said food in accordance with instructions, detail the manner of feeding same, and that his stock has derived no benefit therefrom, otherwise this warranty is of no force or effect. No agreement recognized unless in writing on this sheet.

"ACME FOOD COMPANY,
"188 East Madison Street,
"Chicago, Illinois.
"C. A. HAMMOND, Salesman.

"Form A."

The guaranty referred to was in print, and pasted on the receptacles containing the food. Defendants had purchased food of plaintiffs prior to giving the notes in question, and had been negotiating with them through their agent, Hammond, for larger quantities and more extensive territory. November 18, 1903, plaintiffs wrote to defendants a letter containing the following:

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"We would be pleased to turn to you such dealers as may be possible in the way of assisting you in securing further subagents in the territory unoccupied, and would also guarantee to send you our salesman to work two or three days with such subagents as are established, as well as to give the same amount of assistance to each dealer that you establish, and thereafter to call upon you every thirty to forty-five days as nearly as is possible for the purpose of loaning you such assistance, and after your subagents have been assisted, you would thereafter drive with them from time to time and pull every and all strings possible to bring about the best possible results. By handling the Acme Food business on this basis, you would be able to handle several carloads a year. We have instructed Mr. Hammond to offer you the eastern half of Eaton county, less the territory tributary to Eaton Rapids, and also the western half of Ingham county, providing you favor us with an order for a carload lot and are also in a position to favor us with sufficient information or security, so that we will be able to grant to you the credit favors which you may desire.

"Should you desire to favor us with an order of that character, possibly it would be well for you to also favor us with a property statement on blank inclosed."

On November 19th, defendants executed a written contract with the agent Hammond and forwarded it to the plaintiffs, along with the notes executed at the same time. Hammond had made various material representations to defendants as to the quantity of food in the proposed territory, the ingredients of the food, its efficacy, the number of subagents, and what the plaintiffs would do to help make sales, etc. This contract was drawn in accordance with the terms "as he and I talked." November 21, 1903, plaintiffs wrote defendants as follows:

"Nov. 21, 1903.

"CRANE & MCGEE, Millett, Mich.

"*Gentlemen:* We are today in receipt of your order for a carload of Acme Food, as well as property statements and notes in settlement of the same, and wish to advise that the terms specified in the order are much longer time than we as yet have ever granted, and we feel that in justice to ourselves, with the notes drawn for longer

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time than a period of six months, that they should bear interest at the rate of at least 6 per cent.

"In regard to the contract which you enclosed will say, that as yet we have never given any contract, and do not believe that the same should be necessary, and the only thing necessary is to have a thorough understanding, and will state that we are willing to give you the north half of Eaton county, Michigan, including the city of Charlotte, also all of Ingham county, Michigan, as well as the town of Shaftsburg in Shiawassee county, Fowlersville in Livingston county, and Rives Jct., in Jackson county, Michigan, and to turn to you any and all dealers now established in that territory, for such time as at least one of your firm devote their entire time to the business, or have a salesman to do so, and we will also give you the assistance as provided in our letter of Nov. 18th, 1903. Therefore if this will be acceptable to you, we then will make shipment of the goods and grant you the time which has been requested.

"We notice that you did not order any Acme Poultry Food, and believe it would also be to your interest to also favor us with at least ten cases of the 28 oz. and 5 lb. packages, as well as about 1,000 lbs. in 10 lb. pails. The list price on the 28 oz. packages is $5.50 per case, and the 5 lb. packages, $12 per case, and the 10 lb. pails, $7 per cwt. On the quantities offered in our letter of the 18th you will notice that a 10 per cent. discount is offered you, and on this Poultry Food we would be willing to grant you 120 days time.

"Car will be loaded next Tuesday, and unless we hear from you to the contrary the same will go forward according to the conditions herein named.

"Yours respectfully,

"ACME FOOD CO.

"Dict. G. H. S."

November 23, 1903, defendants replied as follows:

"CRANE & MCGEE,
"Millett, Mich.

"ACME FOOD CO.,
"Chicago, Ill.

"*Gentlemen:* We are in receipt of your favor of 11-21, regarding the order for a carload of food and notes in settlement for same. We insisted that Mr. Hammond make payments according to notes sent you. Our reason for

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doing so was to protect ourselves. However, we can assure you that if we can dispose of the car this winter, all notes will be paid within six months; or we are willing to send you all bills for collection as fast as we ship the food out, but do not feel as though we ought to pay five per cent. on notes.

"In regard to the contract, we do not care very much about it; all we ask is that you do all you can for us to get us started; we have a large territory and it's getting late in the season.

"We wrote you Saturday in regard to the Poultry Food. We will try and get all of our agents to handle it, but do not want to order it now in 10 case lots. Will order later on if we can dispose of it.

"Very truly yours,
"CRANE & MCGEE."

The car of food was shipped by plaintiffs and received and accepted by defendants.

Defendants gave notice of special defenses under the general issue as follows:

1. That plaintiffs had compromised and canceled their claim.
2. That the notes were obtained by fraud.
3. Failure of consideration and breach of contract.

At the close of the testimony, plaintiffs' counsel, among other requests, requested the court to direct a verdict in their favor for the amount of the notes with interest. The court submitted the case to the jury, who returned a verdict for defendants, and plaintiffs have removed the record to this court for review upon numerous assignments of error. Counsel for defendants allege in their brief that:

"The question of compromise was not submitted to the jury except in accordance with the requests of the plaintiffs. See plaintiffs' requests Nos. 31, 32, 33. * * *

"It was further charged in the special notice as a defense, that the notes in question were void for fraud; that the plaintiffs falsely represented that the animal food which was sold to the defendants, and for which the notes were given, was a useful and valuable food and medicine, containing ground flax seed, herbs, and medicinal mate-

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rials. The plaintiffs also falsely represented that there were less than 6,000 lbs. of food in the territory which they were to allot to the defendants, in the hands of the agents or dealers appointed by the plaintiffs to dispose of the food, and the defendants were misled, and bought the stock food in reliance on such representations. The other allegations of fraud contained in the notice were not insisted on at the trial. * * *

"Defendants' contention concerning the fraud in the quality and nature of the food was not submitted to the jury by the court; but only the question whether or not Hammond had falsely represented that there were only 6,000 lbs. in the territory. * * *

"The third division of the defendants' special notice alleged that the defendants were discharged from their obligations under the notes and contract by a material breach of the contract; that the plaintiffs agreed to furnish sufficient advertising matter; to send a salesman to aid for two or three days every 30 or 45 days in the sale of the food; to send a salesman to work for that time with all agents established by defendants, and to sell and dispose of all goods then in the defendants' territory.

"The defendants allege that the plaintiffs failed to send advertising matter in sufficient quantities, and failed to send the salesman to work as stipulated, and neglected to dispose of the goods already in the territory.

"As appears in our statement, the main issues upon which the case was submitted to the jury were but two, viz.:

"*First.* Did the plaintiffs' agent, Hammond, in securing the order of the car load of animal food practice deceit upon the defendants as to the amount of such food then in the territory assigned them?

"*Second.* Did the plaintiffs perform their agreement in furnishing advertising matter and a salesman to aid as promised in the sale of the car load of food in question?"

We think the circuit judge erred in admitting testimony of the representations of the agent, Hammond, to induce the giving of the notes and in submitting the question of fraudulent representations to the jury. The alleged fraudulent representations were made the basis of the agreement between the defendants and said agent. Defendant Crane testified:

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"*Q.* Now, witness, at that time you claim he agreed that what goods were in that territory should be taken up by the Acme Company?

"*A.* I testified they would unload them, that they would dispose of them themselves; Mr. Hammond agreed to that.

"*Q.* He said it didn't make any difference how much there was there, they would sell them out before you begun?

"*A.* Yes, sir, he said they would unload them. I think that was included in the contract. * * *

"*Q.* Whatever you agreed to between themselves, you undertook to place in the original contract sent you to sign?

"*A.* Yes, sir. Mr. Hammond dictated most of the contract and I wrote it."

Plaintiffs declined to accept the agreement made as the agent and defendants had talked, but proposed a new agreement, which defendants accepted and which, thereupon, became the only agreement and the entire agreement between the parties. The last agreement was not only not based upon or obtained by reason of the fraudulent representations, but was independent of them, and, in effect, repudiated them.

Aside from the claim that there was no evidence of plaintiffs' default in that regard, we understand plaintiffs' counsel to concede that the question of plaintiffs' compliance with the agreement to assist defendants by sending their salesman to work with subagents, etc., was properly submitted to the jury. While defendants' letters and conduct indicate very strongly that this part of the agreement was performed to their satisfaction, we cannot say that there was no evidence to the contrary for the consideration of the jury.

Plaintiffs seem to have construed the agreement as requiring them to furnish sufficient advertising matter to aid in making sales of the food, and to have undertaken to do so. Whether they carried out this undertaking was a question for the jury.

We do not understand counsel for defendants to con-

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tend that there was any competent evidence of a settlement, but that such evidence "was not submitted to the jury as a defense, but only as bearing upon the necessity of tender in case a fraud was found to have been perpetrated by the plaintiffs' agent." As we have held that the evidence of fraudulent representations by the agent was improperly received, there was no basis for this testimony.

In case the jury should find, upon another trial, that plaintiffs had not performed their contract as to furnishing advertising matter and other aid to making sales, and that such assistance had not been waived by defendants, plaintiffs' measure of damages would be the contract price, less such amount of damages as defendants should show they had suffered by reason of such default on the part of plaintiffs. Defendants are not entitled to recoup damages on account of the quality or efficacy of the food, they having received precisely what they ordered.

Judgment reversed, and a new trial ordered.

McALVAY, C. J., and CARPENTER, GRANT, and MONTGOMERY, JJ., concurred.

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NOWLEN *v.* HALL.[1]

APPEAL AND ERROR—SECOND APPEAL—LAW OF THE CASE.

Where a defendant in ejectment, after affirmance of a judgment for plaintiff, takes a new trial under the statute, and the evidence on the second trial differs only in respect to a misdescription of the land in one of the deeds, and the question whether the mistake can be shown in an action of ejectment is not raised on the second trial, the decision on the former appeal controls the case.

Error to Berrien; Coolidge, J. Submitted January 17, 1907. (Docket No. 50.) Decided March 5, 1907. Rehearing denied July 15, 1907.

Ejectment by Albert R. Nowlen against Charles W. Hall and others. There was judgment for plaintiff on a verdict directed by the court for an undivided one-half of the property involved, and defendant Hall brings error. Affirmed.

H. S. Whitney, for appellant.

Plummer & Plummer (*George W. Bridgman*, of counsel), for appellee.

MOORE, J. This is an action in ejectment. The case has been here before. It is reported in 128 Mich. 274. Defendant, taking advantage of his right under the statute to another trial, brought the case on for a second trial, this time before a jury. Counsel for defendant conceded in open court that his client had no claim to the city lots, and consented that plaintiff take judgment for them. After hearing the evidence the court instructed the jury to find that the undivided one-half of the acreage prop-

[1] The opinion filed on the original hearing in this case was withheld from publication pending the rehearing.

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erty belonged to plaintiff and an undivided one-half to defendant Charles W. Hall. The jury found accordingly, judgment was so entered, and from this judgment the defendant comes to this court on writ of error. In the opinion handed down when the case was here before there is a detailed statement of facts. A reference to that opinion will give an understanding of nearly all the questions involved here. Upon the second trial the matter of the tax deeds and tax titles was regarded as settled by the opinion to which reference has just been made. In the opinion, Chief Justice MONTGOMERY, in referring to the acreage property, said:

"We find that, while the adverse possession found by the court had the effect to cut off the Miller title, it did not defeat the Boughton title, which subsequently vested in the defendant. The commissioner's deed on foreclosure of the Boughton mortgage did not cover this land at all. The title, therefore, derived through Lewis, was vested one-half in plaintiff, and one-half in defendant. * * *

"Our conclusion is that the judgment should be affirmed as to the city property, and modified as to the acreage property, so called. The plaintiff is entitled to recover one-half of the latter."

The only evidence upon the second trial which casts doubt upon this conclusion is the description contained in the deed, dated January 23, 1861, from Martin Green, by Lucius A. Willard, attorney, and Mary F. Green, wife of Martin Green, and Lucius A. Willard and his wife, to Belmont C. Lewis. The land conveyed therein is described as follows:

"Conveying all that part of the northwest quarter of the northeast quarter of section twenty-four, town four south, range eighteen west, aforesaid, lying south of Territorial Road, twelve acres."

It will be observed that the range mentioned in this conveyance is range 18 west, while the land in controversy is in range 19 west. It was shown that, when this deed was made, the grantors therein had no land on section 24,

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township 4 south, range 18 west, but were the owners of land in section 24, township 4 south, range 19 west. It was further shown that there was no 12 acres of land south of the territorial road in range 18 west. The record also discloses that Mr. Lewis went into possession of the land in range 19 west, and on November 6, 1869, conveyed an undivided one-half interest thereof to Curtis Boughton, which title, by mesne conveyances, was acquired by defendant. It is very clear that a clerical error was made in writing the word "eighteen" when it was intended to write the word "nineteen." We have no occasion to decide whether this mistake can be shown in an ejectment suit. That question was not raised.

Judgment is affirmed.

McALVAY, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

FIRST NATIONAL BANK OF DURAND *v.* SHAW.[1]

1. BILLS AND NOTES—ACTION—PLEADING—NOTICE OF DEFENSE—SUFFICIENCY.

   In an action on a promissory note against several, a notice of special defense, supported by the affidavit of one of the defendants denying the execution of the note, is sufficient to justify the requirement that plaintiff must show the execution of the note before it can be offered in evidence, and to admit the defense of forgery as to some of the signatures.

2. SAME—JOINT AND SEVERAL NOTE—FORGERY IN PART—EFFECT.

   Though a part of the names purporting to be signed to a joint and several note are forged it is valid in the hands of a bona fide holder as against those who actually signed it.

[1] The opinion filed on the original hearing in this case was withheld from publication pending the rehearing.

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Error to Presque Isle; Emerick, J. Submitted January 18, 1907. (Docket No. 57.) Decided March 5, 1907. Rehearing denied July 15, 1907.

Assumpsit by the First National Bank of Durand against Thomas E. Shaw and others on a promissory note. There was judgment for defendants, and plaintiff brings error. Reversed.

John T. McCurdy (*Lyon & Moinet*, of counsel), for appellant.

Charles R. Henry, for appellees.

MOORE, J. This action was brought upon a note reading as follows:

"$600.00 ONAWAY, MICH., Nov. 18th, 1901.

"On September 1st, 1903, after date, for value received, I promise to pay to Comstock & Crawford, or order, six hundred dollars at the Onaway Banking Company office in Onaway, Mich., with interest at 6 per cent. per annum, interest payable annually."

Signed by Thomas E. Shaw and 19 others.

Plaintiff purchased this with two other notes, aggregating $2,000, and claimed to be a bona fide holder thereof. Defendants pleaded the general issue with notice that the note was procured by fraud on the part of the payees; that the names of a number of the signers of the note were forged; that some of the makers signed the note with the understanding and agreement that before the note was to be delivered certain others should also sign it, which was not done; that the note in question was given as the purchase price of a certain stallion; and that the horse did not comply with the representations made by the payees of the note. A copy of the note in question was embodied in the declaration by which the suit was commenced. Thomas Shaw, one of the defendants, made and filed an affidavit, denying the execution of the note. The case was tried before a jury which rendered a verdict in favor of defendants.

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Inasmuch as the jurors were instructed that the plaintiff was a bona fide holder of the note, it will be unnecessary to discuss many of the questions presented by counsel. There are, however, two important questions which call for consideration. The first of these is, Was the notice sufficient to justify the requirement that plaintiff must show the execution of the note, before it could be offered in evidence, and to admit the defense of forgery as to some of the signatures? We think the judge was justified in holding the notice to be sufficient, by the following authorities: *McCormick* v. *Bay City*, 23 Mich. 457; *Wren* v. *McLaren*, 48 Mich. 197; *Haight* v. *Arnold*, 48 Mich. 512; *McRobert* v. *Crane*, 49 Mich. 483; *Thompson* v. *Village of Mecosta*, 127 Mich. 522.

The important question in the case is presented by those portions of the charge to the jury reading as follows:

"Here was a club of 20 men, as is conceded, organized for the purpose of purchasing this horse. Those 20 men were willing to sign notes which would bind them for the payment for that horse. The paper which they did sign—that is, those of them who signed it—is a joint and several note. The language of the note is: 'On September 1st, 1903, after date, for value received, I promise to pay to Comstock & Crawford, or order, six hundred dollars.' And the other notes, each of them for $700, are of the same tenor and purport. It is not only a joint note, of 20 defendants, but it is a joint and several note, upon which any one of these defendants might be sued alone and held for the full payment of the face of that note. And those men, gentlemen, when they signed that note, had the right to have it signed by 19 other men, whose signatures should not be forgeries, but should be the genuine, binding signatures of the men whose names purported to be upon the instrument. It seems to me that that would be common sense. It seems to me to be common sense. It sounds to me as though it would be common fairness, and honesty, and it is the law.

"The question in this case, gentlemen of the jury, for your consideration is whether these claims of these men that they never signed this note, or authorized it, are true. Mr. Gillis, Mr. Curtis, Mr. Irwin, Mr. Deitrich,

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and Mr. Thomas assert they never signed this paper. * * *

"I charge you as the law, that if those five men, or any one of them, did not sign this note — if those five men or any one of them, did not sign this note, or authorize it to be signed for them, but that their names were forged without their consent, it would invalidate the note as to every one of these defendants, and your verdict would be no cause of action. That is the law of this case in a nutshell. * * *

"If you do not find that fact by a fair weight and preponderance of the evidence, you will find a verdict for the plaintiff for $736.02."

Counsel for the defendants insists the court properly instructed the jury upon this phase of the case. We quote from his brief:

"The note in question contained 20 signatures. Five of the men whose names appear on the note allege their names are forged. When the payees procured this note, it was with the understanding and agreement, expressed and implied, that genuine names should be signed to the note of responsible men to the number of 20. Witness Chandler was the last man to s gn the note. There were 19 other names on the note at that time. Mr. Chandler testifies that when he signed the note, the last man to sign it, he did not question the other signatures. At that time he was asked by the payees of this note, who brought it to him, to sign the note, which note, at the time it was so brought to him by the payees, contained from one to five forged names. As soon as the payees obtained Mr. Chandler's name to the note, they retained possession of it, and seek to maintain that it is good in the hands of an innocent purchaser. We contend that it was a forged note and void as against every signature, even in the hands of an innocent purchaser. * * *

"The evidence in this case shows that the payees took the note from man to man, securing the signatures of the makers. To every maker who actually signed the note, there was a forgery before or after his signature. If it was before his signature he was defrauded as much as though it was after his signature. * * *

"If those five names had been signed by the parties themselves, the other 15 signers would have less to pay. They were therefore prejudiced in any view we may take

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of it, by the forgery of the names in the note; and, as held in *Searles* v. *Seipp*, 6 S. Dak. 472: 'Under the modern authorities, such a note is held void in toto.'"

There can be no serious doubt that forgery of a negotiable instrument, or the indorsement thereon, except in case of ratification or estoppel, nullifies the instrument as to all parties against whom the forgery is committed. Norton on Bills & Notes (3d Ed.), p. 254, and this is true of paper which is altered in a material part. 2 Parsons on Notes & Bills, pp. 571, 580. It has been held that the destruction of a memorandum written under a promissory note, and qualifying it, vitiates the note in the hands of a bona fide holder, having no knowledge of the alteration. *Wait* v. *Pomeroy*, 20 Mich. 427; *Holmes* v. *Trumper*, 22 Mich. 429; *Bradley* v. *Mann*, 37 Mich. 1; *First Nat. Bank of Cassopolis* v. *Carter*, 138 Mich. 421, and the many cases there cited. These cases are not conclusive of the question involved here. An examination of the cases will not show one where part of the signatures were genuine and part forgeries, which had been placed thereon before the note was executed and delivered. Nor will they show a case where the alteration was made before the note was delivered. We think this is an important distinction.

Counsel for plaintiff contend that while the charge of the court might be good in a controversy between the original parties to the note, that it is not good law when applied to a bona fide holder of the note. They urge that as the note is joint and several, that even though some of the makers could not be held because their names were forged that this would not be true of those whose signatures are genuine, citing many cases.

Selser v. *Brock*, 3 Ohio St. 302, was a case where Mr. Briggs signed after two other signatures that were forged, though he supposed at the time they were genuine. In disposing of the case the court said:

"The relation between a surety and the holder of a promissory note, is, in many respects, similar to that which

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exists between the indorser and the holder; and we learn from Story on Promissory Notes, p. 153, that the obligations which exist between the indorser and every subsequent holder of a promissory note, are similar to that which exists between the drawer and the payee of a bill of exchange. And one of the consequences of a doctrine that a negotiable instrument, after indorsement, will pass by mere delivery, is, that if it should, after indorsement, be lost or stolen, or fraudulently misapplied, any person who should subsequently become the holder of it, bona fide, for a valuable consideration, without notice, would be entitled to recover the amount thereof, and hold the same against the rights of the owner, at the time of the loss or theft. This arises from the peculiar rights and obligations of negotiable paper, and the nature of the functions which it performs in commercial transactions. There is, therefore, great justice and propriety in the rule, that the payee or indorsee of negotiable paper takes it free from any of the conflicting equities existing between the several makers or obligors, of which he had no notice."

In *Bigelow* v. *Comegys*, 5 Ohio St. 256, it was held that a surety to a replevin bond was not relieved of liability because the name of the other surety on the bond was forged.

To the same effect in relation to the bond of a cashier is *Franklin Bank* v. *Stevens*, 39 Me. 532.

In *York County Mut. Fire-Ins. Co.* v. *Brooks*, 51 Me. 506, it was held no defense that the surety to a bond was induced to sign by the promise of the principal that he would obtain other signatures before the bond was delivered, which promise was not performed, if the obligee had no knowledge. It was also so held where the surety signed, supposing a forged name thereon was genuine, the obligee being ignorant of the facts surrounding the giving of the signature.

In *Veazie* v. *Willis*, 6 Gray (Mass.), 90, the guarantor of a note indorsed by B., C., and D. was held liable where the signatures of the maker and of B. were forgeries. In the opinion it is said:

"The ground of objection to the maintenance of the

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action is, that the contract, on the part of the defendant, was made upon the assumption that all the names borne on the note were genuine signatures, and that he intended only to guarantee the solvency and ability of the parties to pay the same, treating all the names thereon as liable, as parties to the note. But, it appearing, upon the facts stated, that the defendant guaranteed the payment of this particular note, and thereupon the plaintiff concluded his agreement to purchase the note, both parties being equally innocent as to any fraud, misrepresentation, or concealment, the court are of the opinion that, upon the nonpayment of the same at its maturity by the parties whose names were borne thereon, the defendant, under his guaranty, became liable to pay the same to the plaintiff, although it now is made to appear that the names of the maker of the note and one of the indorsers were forgeries."

In *Stoner* v. *Millikin*, 85 Ill. 218, a surety was held liable though he had refused to sign unless another person first signed, and the principal maker of the note, instead of obtaining the signature of the other as promised, forged his name. In the opinion, it is said:

"Why should this forgery operate in discharge of Stoner, and entitle him to have his property exempted from sale on the execution? It may have been a wrong toward him, and have caused him to incur a greater extent of liability than he expected; and the supposed obtaining of the execution of the note by John Lee may have been the sole condition upon which he signed his name to the note. Yet, on satisfactory evidence to himself, in that respect, he did place his name unconditionally to the note as a maker thereof, and left it with Thomas Lee to deliver to Millikin & Co., knowing that on the faith of his (Stoner's) promise to repay it, they would part with their money to Thomas Lee. There is no just reason why this promise to Millikin & Co. should not be kept.

"Whatever of wrong there was to Stoner, was perpetrated by his co-maker, Thomas Lee. Millikin & Co. were wholly innocent in the matter. They had no notice of anything which had been transpiring among the makers of the note, as between themselves. Nor was it incumbent upon Millikin & Co. to exercise care over the interest of the surety in the note, look to the inducement which led him to become such, and see that it should not fail.

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They had but to watch over their own interest, and see that the security offered was a sufficient protection for them. For the lack of the vigilance they failed to exercise in this respect, they suffer the full consequence in the loss of the security of the name of John Lee. Whatever of fraud and deception the co-makers of the note practiced toward one another, was their own sole concern, and the consequence, so far as may affect them in their relation to each other, should be borne by themselves alone. There is no justice in requiring Millikin & Co. to assume the risk of such conduct, and no sound principle upon which they should be made to suffer loss because of it, not being privy thereto.

"*York County Mut. Fire-Ins. Co.* v. *Brooks*, 51 Me. 506, and *Selser* v. *Brock*, 3 Ohio St. 302, are direct authorities to the point that such a forgery of the name of a prior surety will not discharge a subsequent surety. See *Young* v. *Ward*, 21 Ill. 223. We regard the language of Lord Holt, in *Hern* v. *Nichols*, 1 Salk. 289, as applicable, that 'Seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.'"

In *Deardorff* v. *Foresman*, 24 Ind. 481, A executed his note, payable to the order of B, and induced C and D to sign as sureties upon the promise that A would procure other persons named by him to sign as sureties. He did not do as he agreed but delivered the note to B. In a long opinion in which a large number of cases are discussed it is held that C and D were liable. See *State, ex rel. McCarty*, v. *Pepper*, 31 Ind. 76; *Carr* v. *Moore*, 2 Ind. 602.

In *Helms* v. *Agricultural Co.*, 73 Ind. 325, a surety was held liable though some of the signatures were forged. In the opinion it is said:

"The doctrine of the instructions given is expressed in the following proposition, namely: When the name of one of two or more obligors in a bond, note, or other writing obligatory, has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound,

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if the payee or obligee accepted the instrument without notice of the forgery. This doctrine is supported either directly or in principle by the following authorities: *Veazie* v. *Willis*, 6 Gray (Mass.), 90; *York County Mut. Fire-Ins. Co.* v. *Brooks*, 3 Am. Law Reg. (N. S.) 399 [51 Me. 506]; *Franklin Bank* v. *Stevens*, 39 Me. 532; *Stoner* v. *Millikin*, 85 Ill. 218; *Selser* v. *Brock*, 3 Ohio St. 302; *Bigelow* v. *Comegys*, 5 Ohio St. 256; *Hagar* v. *Mounts*, 3 Blackf. (Ind.) 57; *Harter* v. *Moore*, 5 Blackf. (Ind.) 367; *Carr* v. *Moore*, 2 Ind. 602; *State* v. *Van Pelt*, 1 Ind. 304; *Deardorff* v. *Foresman*, 24 Ind. 481; *State, ex rel. McCarty*, v. *Pepper*, 31 Ind. 76; *Craig* v. *Hobbs*, 44 Ind. 363; Brandt on Suretyship and Guaranty, § 358.

"The appellants insist on a contrary doctrine, relying mainly for authoritative support upon the case of *Seely* v. *People*, 27 Ill. 173. That case goes full to the extent claimed for it, but it was confessedly decided without citation or knowledge of any supporting authority, and has recently been expressly overruled by the case of *Stoner* v. *Millikin*, supra, which, besides a citation of adjudicated cases, is supported by reasons much more satisfactory and conclusive."

This case is cited with approval in *Hunter* v. *Fitzmaurice*, 102 Ind. 449, where it was held that when the name of one of two or more obligors on a note is forged the co-obligor though only a surety who signed in the belief that the forged name was genuine, is nevertheless bound, if the payee accepted the note without notice of the forgery. In the case at bar a joint and several note, purporting to have been signed by 20 persons, is before maturity put afloat. There is nothing in its appearance to cast doubt upon any of the signatures. A bank becomes a bona fide holder of the note. It turns out that some of the signatures are forged. If we apply the principles of law stated in the cases to which we have called attention, is it not clear that the signers whose signatures are genuine are liable? We think the answer must be in the affirmative.

Judgment is reversed, and new trial ordered.

MCALVAY, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

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KAESS v. TIVOLI BREWING CO.[1]

1. SAVING QUESTIONS FOR REVIEW—ESTOPPEL TO ALLEGE ERROR —ACCEPTANCE OF COURT'S THEORY OF CASE.

An admission by counsel, in answer to a question put by the court, that the testimony did not show negligence in a certain particular, evidence offered on that theory having been excluded, and failure to object to the statement in the charge that plaintiff withdrew any claim of negligence in that behalf, do not estop plaintiff from relying in this court on the exceptions taken to the exclusion of the evidence offered in support of that theory, it not being clear that counsel did not misunderstand the position of the court in stating his theory of the case.

2. MASTER AND SERVANT—PERSONAL INJURIES—UNSAFE APPLIANCES—NEGLIGENCE—EVIDENCE—ADMISSIBILITY.

In an action for the death of a servant caused by inhaling ammonia gas blown out of a pipe joint claimed to have been packed with an improper gasket, evidence that other gaskets of the same material, placed at the same time, and subject to the same influences, had been removed because of deterioration, is admissible as showing a duty to inspect.

3. SAME.

It appearing that oil had a softening effect upon the gaskets, testimony tending to show the presence of oil in the pipes, and the impossibility of entirely avoiding it, is admissible.

4. WITNESSES—EXAMINATION — LEADING QUESTIONS — RELUCTANT WITNESS.

Where plaintiff, in a personal injury case, is obliged to call defendant's engineer to make his case, counsel should be permitted to put leading questions to him and introduce his contradictory statements.

5. MASTER AND SERVANT — PERSONAL INJURIES — UNSAFE APPLIANCES—NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of a servant caused by inhaling ammonia gas blown out of a pipe joint claimed to have been packed with an improper gasket, evidence and rulings on evidence examined, and *held*, that it could not be said, as a mat-

[1] The opinion filed on the original hearing in this case was withheld from publication pending the rehearing.

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ter of law, that, with evidence which the plaintiff might have produced except for erroneous rulings, the cause of the accident would appear to be entirely conjectural, or that the case presented would be one devoid of evidence that a previous inspection would have been of value.

Error to Wayne; Rohnert, J. Submitted October 11, 1906. (Docket No. 67.) Decided March 12, 1907. Rehearing denied July 15, 1907.

Case by Libbie Kaess, administratrix of the estate of Gottlieb Kaess, deceased, against the Tivoli Brewing Company for negligently causing the death of plaintiff's intestate. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

James McNamara and *Frank C. Cook*, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

BLAIR, J. Plaintiff brought this action to recover damages for the death of her husband while in the employ of defendant, occasioned by inhaling the vapor of ammonia, alleged to have occurred through defendant's negligence. Defendant owned and operated a brewery at the city of Detroit, and, in connection therewith, on March 10, 1902, operated a refrigerating plant, using a system of pumps, coils, and pipes, through which liquid ammonia was forced for refrigerating purposes. The entire refrigerating plant, including the pumps, pipes, joints, and gaskets all complete, was made in Detroit, and was installed in defendant's brewery in 1898. About 1,000 pounds of anhydrous ammonia was used to charge the refrigerating machine. From the machine the ammonia is pumped through pipes and coils through the cellar, is compressed, expanded, and then cooled and returned to the machine to be used again. These pipes when they leave the machine are three-quarters of an inch in diameter and run from the engine room into the

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cellar. As they pass into the cellar, is placed an expansion cock three-quarters of an inch in diameter, and beyond this expansion cock the pipes are two inches in diameter. This expansion cock is barely opened from its seat, so that the point of a needle can just about be put through it. At the time the plaintiff was injured, there was a pressure of 165 pounds to the square inch on the pipe between the machine and the expansion cock, and a pressure of about 25 pounds to the square inch on the farther side of the expansion cock. Henry Heuge was defendant's engineer, and had charge of the refrigerator plant, including the machinery, pipes, and coils generally, and the gaskets.

Plaintiff's intestate was employed at general work around the brewery, and about 11 o'clock a. m., on March 10, 1902, he was cleaning out some beer tanks in the cellar when a rubber gasket blew out from between the flanges of a joint located behind the door leading from the cellar into the engine room, and the ammonia vapor escaped from the pipes. The joint where the gasket blew out was a flange joint. The gasket fits into a circular depression or channel in the nature of a countersink in the flange; the other flange having a corresponding projection from the face of the flange fitting quite closely the depression in the former, thereof and thereby inclosing and including the gasket within iron walls when the four bolts at the corners are screwed up tight.

The declaration charged that plaintiff's intestate was injured by reason of defendant's negligence in failing to provide a safe place to work, in failing to keep its plant in a safe condition; in failing to use lead gaskets, in using rubber gaskets, and in failing to properly inspect the pipes and gaskets, and in using the same without any proper inspection. At the close of plaintiff's testimony, the court directed a verdict for defendant, on the ground that no negligence had been shown on the part of defendant. Plaintiff assigns error upon the direction of the verdict and upon rulings of the court as to the admissibility of

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testimony. Did plaintiff establish a prima facie case of negligence on the part of defendant?

Henry Heuge testified that in about five minutes after Kaess came out, he went into the cellar and found that the gasket between the flanges of a certain joint behind the door between the cellar and the engine room was blown out. It was a rubber gasket about two inches in diameter on the outside, and the joint was a flange joint —an ordinary iron flange.

"I did not examine the condition of this gasket that had been blown out. I took a knife and scraped it off and put in a new one and bolted it up.

"*Q.* How much did you scrape off?

"*A.* About half or a little over.

"*Q.* The rest was blown out?

"*A.* It must have been somewhere. I couldn't find it.

"*Q.* Did you see it?

"*A.* No."

This joint was so located that the door referred to, if opened wide, would strike it; but there was no evidence that the door ever had struck the joint.

"When the gasket is put into the female and the male is on top of it and screwed up tight, that flattens the gasket that is put between them. The idea of having the gasket between them is to make a joint tight, and to keep up the pressure. If the pipe were put together with a gasket which was not tight and the machine started, the ammonia would leak through the crevice where it did not fit tight, and the object of the gasket between the male and the female is to stop up the opening and make everything tight. Both rubber and lead gaskets are used. Practically more rubber than lead. * * *

"*Q.* Did you ever make any inspection of these gaskets or these joints?

"*A.* No, sir. * * * I walked through there and looked around to see if everything was safe and tight. That is all the inspection I made."

Rubber gaskets and lead gaskets were used interchangeably, some preferring one and some another. The witness had been in the cellar about 10 minutes before Mr.

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Kaess was injured. When he scraped off the gasket, it felt soft to the point of his knife, which might have been occasioned by a little oil getting in there.

"We have to keep the cylinder oiled when it is under such high pressure. It is pretty hot when the compresser presses the ammonia. * * *

"*Q.* What is the effect of the oil left in the ammonia and circulating through the pipes upon that rubber gasket?

"*A.* It will soften it on the inside. It will soften it."

Oscar Lamsens, a witness sworn on behalf of the plaintiff, testified: That he had been connected with the Stroh and the American breweries, and was connected with the Tivoli brewery from October, 1901, to April, 1902, during which time he took the place of the brewmaster while he was absent in Europe.

"During my experience in different breweries, I have become acquainted and familiar with the process of using ammonia in the refrigerating machines. I have had practical experience for the last 3½ years, and have had a technical knowledge for the past 10 years. I acquired my technical knowledge in a brewing school in connection with the university at Berlin, which I attended for two years. They used refrigerating machines there, and I studied them. I had practical experience with the refrigerating machines at the Stroh, the Tivoli, and the American breweries."

That a special oil is always used. They pump it into the system, and it goes over the cylinder and into the oil trap. The rest of it goes into the system and comes back.

"*Q.* What is the effect of the oil upon rubber used for making rubber gaskets?

"*A.* I think as long as the gasket is tight between the two flanges, it could not affect it at all. * * *

"*Q.* Do you know what kind of gaskets were ordinarily used in joints in systems connected with a refrigerating plant at the time of the accident?

"*A.* We only used lead; but I know some other firms that use rubber. * * *

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"*The Court:* You have never seen the effect of rubber or lead gaskets except at the American?

"*A.* No, sir.

"*The Court:* Do you use any rubber out there?

"*A.* No.

"*Q.* Then you don't know the effect upon a rubber gasket when it is used upon the joints of an ice machine?

"*A.* No. * * * Ammonia is dangerous to handle, and the danger increases with the increase of the pressure. The purpose of the bolts in the holes of these flanges is to hold them and to tighten them up. It is necessary to have the joints tight. If a joint was made with the male and the female joints and the bolts were to be loose, the joint would leak. If the flange is tight, it does not leak. If the gasket is properly put in and the bolts are tight, it will not leak.

"*The Court:* Do you know the character of ammonia, whether it is penetrating or not, ammonia fumes? If this was not absolutely tight, would not the ammonia leak out?

"*A.* Yes, sir.

"*The Court:* In other words, if it was not absolutely tight, then there would be sufficient leakage so that it would indicate a leakage without danger to life.

"*A.* Yes, sir; I could smell it.

"*The Court:* In other words, you would discover it by the smell?

"*A.* Yes, sir; I could smell the leak.

"*Q.* Would you consider that a gasket would blow out from a small leak?

"*A.* It would be a big leak. The rubber adheres to the face of the flange when it is screwed up. It sticks on there.

"*Q.* How is it removed when they break the joint and take it out?

"*A.* With a knife.

"*Q.* Does it cling hard?

"*A.* Generally you go around with a knife and clean it off with a knife.

"*Q.* When a gasket is once put in the joint and it is tightened up, what, if anything, is necessary to do with the bolts afterwards to keep it tight?

"*A.* When the gasket is once tight, it generally stays tight, unless by changes in the temperature or something of that kind it becomes loosened. The higher the temperature, the more it will loosen up. If it loosens up, you tighten it.

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"*Q.* What do you call following up a bolt?

"*A.* Taking them up, one after the other, tightening them up, one at a time. *If you have a joint tight in the first place, you do not go over it until you smell a leak. It is not necessary.*

"*Q.* Could a lead gasket blow out of that joint such as there was there, if it was tight?

"*A.* I know that the lead gasket would not blow out, in my judgment.

"*The Court:* Have you ever seen an instance where a gasket has blown out?

"*A.* That is the only one.

"*The Court:* The only one you ever heard of?

"*A.* Yes, sir.

"*Q.* As I understand it, the inspection you made of these machines when they are tight, if the joint is tight, you go through there and nothing is done with the joint unless you smell ammonia?

"*A.* Yes, sir. * * * Ammonia, when it comes under high pressure, is liquid and is compressed, and, when it is released, it vaporizes instantly, and forms fumes. If it were turned into this room, it would go all over, and that property of expansion is very fast; awfully fast. * * *

"*Q.* You never examined the joint, did you?

"*A.* No, sir.

"*Q.* Did you examine it after it was blown out?

"*A.* No, sir.

"*Q.* So far as you know, it had never leaked?

"*A.* No. sir.

"*Q.* And the fact that it had not leaked would be an indication to cause you or any engineer to think that that joint was in proper condition?

"*A.* Yes, sir.

"*Q.* The first signal of danger that you would get would be the smell of the liquid?

"*A.* Yes, sir.

"*Q.* And that experience would apply to all machines?

"*A.* Yes, sir.

"*Q.* And you consider that a signal?

"*A.* Yes, sir. * * *

"*Q.* I will ask this question: If that joint had been screwed tight, and the gasket had blown out with 165 pounds pressure on it, could it have blown out with 165 pounds on it, if the joint had been screwed up tight?

"*A.* I don't know the condition of the gasket. * * *

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The flange might have something to do with it. If the female did not fit on the male, it would not be possible to make a tight joint.

"*The Court:* If that joint was drawn up tight with a rubber gasket in it, what pressure would blow it out, if you know?

"*A.* I cannot tell you that. * * *.

"*Q.* Can you tell approximately?

"*A.* Yes, I judge 200 pounds; not over that.

"*Q.* 200 pounds would not blow it out?

"*A.* No, sir; it would not blow it out. * * *.

"*Q.* Now, I ask you when the plant is installed and properly set up, whether or not the inspection that is made by the person who is running the plant to ascertain whether or not these joints need attention, comes from a small leakage or small ammonia gas and from a leak in the joint—isn't it true that that is the only time that you give them any attention?

"*A.* Yes, sir. We screw them up then. * * * There is no plant that don't have some leaks. A hole was punched through one of the pipes down there. It was quite small. We did not determine how much of a hole it was, but if you could put the smallest needle into it, it would be enough to fill the room with ammonia inside of a minute."

Page Eaton, a witness for plaintiff, testified:

"I looked at the place where the ammonia came through the pipe as soon as the ammonia got out so that we could get in there. I should judge that was about 15 minutes after the accident. Before that time the engineer had a hose in the cellar to scatter the water and to condense the ammonia. In the place where the ammonia came through, the gasket was blown out. This was behind the door. A little past the door. * * * I saw a piece of the gasket that blew out. It was on the floor, I believe, near the joint. The engineer had it, if I remember right, when I saw it. He showed it to me, we were looking at it. It seemed to be rotten and old. I don't just remember how it did look."

Charles Tart, a witness for plaintiff, testified:

"*Q.* Now, will you state if that joint which blew out was made with a rubber gasket such as this joint is, with a rubber gasket inside of it and having bolts which would

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go into the four corners and which were screwed up tight, whether that gasket could have blown out?

"*A.* No, sir.

"*Q.* At 165 pressure?

"*A.* No, sir."

In the course of the trial, plaintiff's counsel stated his theory of the case, as follows:

"My theory is that the door had been striking this joint for four years, and had loosened it, and the oil run down through there and rotted it, and a rubber gasket is an improper gasket to use in that place. I intend to show that if this joint was properly made, it was impossible for it to have broken, regardless of whether rubber or lead was used. I will not leave it to any inferences."

At the close of the testimony the following occurred:

"*The Court:* It is your claim that the accident happened because the flange was not screwed up tight?

"*Mr. Cook:* Yes, it was not screwed up tight. It sets in there three-sixteenths of an inch, and if it had been screwed up tight, the gasket could not have come out. It would be up against the face of the flange, and it could not have blown out unless the flange had been separated somewhat. My claim is that this joint became loosened in some way, and that no inspection had been made to discover the condition, and that is negligence.

"*The Court:* Then you make no claim that by reason of rubber gaskets there was negligence?

"*Mr. Cook:* I will admit that the testimony does not show that."

No requests to charge, so far as the record discloses, were presented by either side. In the course of the charge, the court said to the jury:

"The attorney for plaintiff withdraws any claim that there was negligence by reason of an imperfect gasket, and plants his case upon the theory that this accident could not have happened unless the bolts which held the flanges together were loose, and that the duty which the defendant owes the plaintiff under those circumstances was an inspection of those things which would reveal the loose condition."

It is claimed by counsel for plaintiff that this was an

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incorrect statement of his position, and that the effect of his statement with reference to the gaskets was to admit that the testimony admitted by the court did not show that there was any negligence in consequence of using the rubber gaskets instead of the lead gaskets, and that having taken proper exception to the rulings of the court upon evidence which might have substantiated his position, he is still entitled to insist upon his exceptions. We cannot say that there is no support for the position of plaintiff's counsel and that he may not have misunderstood the position of the court in stating his theory of the case. He may have supposed that the court was stating this theory with reference to the case as left by the rulings of the court, and, in view of previous admonitions, was not inclined to interrupt. There is also room for the conclusion that his admission quoted above was limited to the case presented under alleged erroneous rulings of the court. We think that testimony which might have been very important was excluded by the court. Plaintiff's counsel sought to show that prior to the injury to the plaintiff's intestate certain gaskets on this same high pressure side of the expansion cock had been removed from other joints than the one in question and replaced with others, but the court refused to permit questions with this purpose to be answered, and this forms the basis of the plaintiff's first assignment of error.

Inasmuch as the gasket is absolutely essential to the tightness of the joint, and inasmuch as the gaskets were all originally put in at the same time in 1898 and the gasket in question had never been inspected from that time until the time of the accident in 1902, the fact that it was found necessary to remove other gaskets and replace them, in joints subject to the same pressure as the joint in question, if it appeared from the answers that such removal was made necessary by the deterioration of such gaskets, would have a very important bearing upon the question whether or not it was the duty of defendant

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to inspect such gaskets from time to time to ascertain their condition.

Plaintiff's counsel also propounded a question to the witness Heuge, who had testified that they drew off all of the lubricating oil circulating through the pipes which they could get out in the oil traps, as follows:

"*Q.* Isn't it a fact that you cannot draw it all out?

"This question was objected to, and the court said: 'If you cannot draw it out, you cannot help it being there.'

"*Mr. Cook:* But if I show that it has been there for years—

"*The Court:* I don't want any argument now, Cook. We are talking of the difference of conditions when they draw off all they can through the cock. That is the testimony. They try to have it all drawn off, if possible, through the oil cocks. That is the testimony. Now proceed."

The further question was put by plaintiff's counsel:

"*Q.* What is the effect of oil upon rubber used in making rubber gaskets?

"*A.* I think as long as the gasket is tight between the two flanges it couldn't affect it at all.

"*Q.* What effect would it have if the gasket was not tight?"

The answer to this question was excluded by the court. It is apparent from some of the testimony which was permitted that oil has a softening effect upon the rubber gaskets, and there was also testimony that the gasket in question was soft and appeared old and rotten. As the tightness of the joint depended to a large extent upon the condition of the gasket, it would seem that, if the effect of the oil necessarily used in the pipes was to soften and disintegrate the rubber, and perhaps make it pervious to the ammonia under its high pressure, the jury might infer from this a duty on the part of the company to occasionally inspect the gaskets, for the purpose of ascertaining their condition, and this inference would be strengthened if it should appear that other gaskets subject to the same pressure, and under similar circumstances, were found to be defective and removed for that

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reason. It seems apparent that the sense of smell may not be a sufficient notification, as illustrated by this very case, and that even though the joint was tight in the first instance, the deterioration of the gasket, even though the bolts remained in the same position, might eventually render the joint loose. While the court was perhaps justified in understanding the position of counsel for plaintiff, as he stated it, still, in view of the fact that the counsel for plaintiff may not have appreciated the effect of the statement of the court, we are inclined to hold that counsel is not foreclosed from any of his exceptions in consequence of not having called the court's attention to the inaccuracy of his statement. The duty of inspecting the gaskets is asserted in the declaration; evidence was offered to prove that duty, which was, as we think, erroneously rejected, and it is undisputed that the duty, if found to have existed, was not discharged. We also think that, in view of the relation of witness Heuge to the case and of the apparent necessity imposed on plaintiff of calling him as her witness, plaintiff's counsel should have been permitted to put leading questions to him and introduce his contradictory statements, if any. Furthermore, we are of the opinion that the presence of oil in the pipes and its effect upon the rubber gaskets was competent. We do not think it can be said, as a matter of law, that, with evidence which the plaintiff might have produced except for the erroneous rulings, the cause of this accident would appear to be entirely conjectural, or that the case presented would be one devoid of evidence that a previous inspection would have been of value. *Warren* v. *Railway Co.*, 141 Mich. 298; *Schoepper* v. *Chemical Co.*, 113 Mich. 582; *O'Neill* v. *James*, 138 Mich. 567 (68 L. R. A. 342); *McLean* v. *Railroad Co.*, 137 Mich. 482; *Stowell* v. *Standard Oil Co.*, 139 Mich. 18.

The judgment is reversed, and a new trial granted.

GRANT, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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In re EMERY.

1. CONTEMPT—STATUTORY PROVISIONS—APPLICATION TO CRIMINAL PROCEEDINGS.
   Chapter 301, 3 Comp. Laws, relates to "Proceedings as for Contempts to Enforce Civil Remedies," and does not apply to contempts in criminal proceedings.

2. SAME—CRIMINAL CONTEMPTS—POWER TO PUNISH.
   Section 1098, 1 Comp. Laws, relating to criminal contempts, does not confer upon the circuit court the power to punish for contempt an interference with the people's witnesses on a preliminary examination pending before a justice of the peace, but by its terms excludes such authority.

3. SAME—CAUSE DEPENDING IN COURT—CRIMINAL EXAMINATION.
   A preliminary examination before a magistrate on a criminal charge triable in circuit court is not a cause or matter depending or triable in circuit court such that an interference with the witnesses therein may be punished by the circuit court as a contempt under its general constitutional jurisdiction.

Certiorari to St. Clair; Law and Tappan, JJ. Submitted July 2, 1907. (Calendar No. 22,331.) Decided July 17, 1907.

Thomas Emery was found guilty of contempt, and sentenced to pay a fine of fifty dollars, or in default thereof to imprisonment in the county jail not exceeding thirty days. Reversed, and proceedings quashed.

John M. Kane and *John L. Black* (*William T. Mitchell*, of counsel), for petitioner.

P. H. Phillips, for respondents.

BLAIR, J. Plaintiffs in error were found guilty of conspiring together to induce one John McIntyre, a material witness for the people, to remove himself from the juris-

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diction of a justice's court of the city of Port Huron, in which was pending an examination upon a complaint charging one David Murphy, a saloonkeeper, with furnishing and giving intoxicating liquors to the said John McIntyre, a minor of the age of 15 years. Thomas Emery is an attorney at law and appeared for the respondent Murphy as his attorney in the criminal proceedings.

The sole question for our consideration is whether the circuit court had jurisdiction to entertain the contempt proceedings. It is unnecessary to consider the questions raised as to the power of the circuit court to punish for contempts committed against itself. Such questions have been fully settled by this court. *Nichols* v. *Judge of Superior Court of Grand Rapids*, 130 Mich. 187.

But plaintiffs in error contend that in the present instance the contempt was not committed against the circuit court or any of its officers, nor in any matter concerning that court. On the other hand, it is claimed that the proceedings constituted "a cause or matter depending or triable" in the circuit court, and that the power to punish for a contempt therein is expressly conferred upon the circuit court by subdivision 4 of section 10891, 3 Comp. Laws. Chapter 301, containing the section in question, relates to "Proceedings as for Contempts to Enforce Civil Remedies," and does not apply to contempts in criminal proceedings. *City of Eaton Rapids* v. *Horner*, 126 Mich. 52; *In re Osborn*, 131 Mich. 118.

Section 1098, 1 Comp. Laws, relating to criminal contempts, does not confer the power to punish for a contempt such as the present, but by its terms excludes such authority. It has been held, however, that this section does not apply to the circuit courts, and does not limit their inherent and exclusive constitutional powers over contempts. *Nichols* v. *Judge of Superior Court of Grand Rapids*, supra. If, therefore, the pending examination was a cause or matter depending or triable in the circuit court, we are satisfied that that court under its

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general constitutional jurisdiction would have power to punish the alleged contempt. Was the examination a matter depending or triable in the circuit court? We think not. At the time of the commission of the alleged contempt, the matter was not triable in any court; but the object of the examination was to determine whether an offense had been committed which would be triable in the circuit court, and, until the examining magistrate committed the defendant for trial, there was no case depending or triable in the circuit court. The functions of justices of the peace in holding such examinations are referred to by Justice CAMPBELL, in his opinion in *Allor* v. *Wayne County Auditors*, 43 Mich. 76, as follows:

"The power to examine and commit persons charged with crimes beyond the cognizance of justices to try is also intrusted to justices of the peace in common with various judges, judicial officers, and city officers. 2 Comp. Laws 1871, chap. 259. This power is not exercised by those officers as courts, and it is not in the proper sense of the term 'judicial power.' It may be vested in other persons than courts, as well as in courts. It belongs to the duties of conservators of the peace; and the Constitution has made supreme and circuit court judges, as well as justices of the peace, such conservators. Article 6, § 19. The difference between this power and that of trying offenders is referred to, among other cases, in *Daniels* v. *People*, 6 Mich. 381, and *In re Farnham*, 8 Mich. 89."

The power to punish for such contempts as the present has not been committed to the circuit court by any statute, and we are of the opinion that such power is not inherent in the court.

Order vacated, and proceedings quashed.

MCALVAY, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

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BOARD OF CONTROL OF THE MICHIGAN STATE PRISON *v.* AUDITOR GENERAL.

STATUTES—ENROLLMENT—VARIANCE—EFFECT.

Act No. 211, Pub. Acts 1907, appropriates "one hundred seventy-five thousand dollars" for the purpose of establishing a binder-twine plant at the State prison: "*Provided*, that of the one hundred seventy-five [thousand] dollars so appropriated, fifty thousand dollars is" appropriated for a certain purpose, "and the remaining sum of one hundred twenty-five thousand dollars is" appropriated for a certain other purpose germane to the purpose of the bill. The word "thousand" in brackets did not appear in the enrolled act as signed by the governor, though it did in the bill as passed by the legislature. *Held*, that the omission of the bracketed word was a mere clerical error which corrects itself and leaves nothing doubtful, and that the act is therefore valid.

Mandamus by the board of control of the Michigan State prison to compel James B. Bradley, auditor general, to draw a warrant upon the State treasurer under the provisions of Act No. 211, Pub. Acts 1907. Submitted August 13, 1907. (Calendar No. 22,424½.) Writ granted August 13, 1907.

John E. Bird, Attorney General, for relator and respondent.

MONTGOMERY, J. The legislature of 1907 passed an act known as Act No. 211, Pub. Acts 1907, and entitled:

"An act to provide for the installation, maintenance, equipment and operation of a twine and cordage plant to be operated by prison labor at the State prison at Jackson, Michigan, to provide for the sale and disposition of the manufactured product; to define the duties of the warden and board of control of said prison in relation thereto; to make an appropriation for the fiscal year ending June thirty, nineteen hundred eight, to carry into effect the object and purposes of this bill and to provide a tax to meet the same,"

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Which said act was approved by the governor, June 24, 1907, and was given immediate effect. It appears that in the original bill, now on file in the secretary of State's office, the word "thousand" appears in the proviso of section one of the act after the words "one hundred seventy-five," while in the enrolled act which was signed by the speaker of the house, the president of the senate, and the governor, the word "thousand" was omitted. The board of control of the prison has made a regular requisition upon the auditor general requesting him to draw his warrant upon the State treasurer for one thousand dollars, payable to the warden of the State prison, out of the moneys appropriated by the above-mentioned act. This the auditor general refuses to do, claiming, for the reason above stated, that the bill signed by the governor in which the word "thousand" was omitted as aforesaid was not the bill which passed both houses of the legislature. The refusal of the auditor general was based upon an opinion given at his request by the attorney general on the 25th day of July, 1907, in which, after a discussion of the various authorities, the attorney general advised that in view of the defect contained in the act and the consequent doubt as to the validity of its enactment, no money should be paid out until the validity of the act had been judicially determined. Mandamus is now applied for to direct the auditor general to honor the requisition of relator.

Section 1, of the act as enrolled, reads as follows:

"There shall be appropriated out of any of the money in the State treasury not otherwise appropriated for the fiscal year ending June thirty, nineteen hundred eight, the sum of one hundred seventy-five thousand dollars for the purpose of carrying out the provisions of this act: *Provided*, That of the one hundred seventy-five [thousand] dollars so appropriated fifty thousand dollars is hereby appropriated for the purpose of purchasing, erecting and equipping the necessary buildings, machinery, boilers and equipment to be used in the manufacture of twine and cordage, together with a warehouse at the State prison at Jackson, Michigan, and the remaining sum of one

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hundred twenty-five thousand dollars is hereby appropriated to constitute a "revolving fund" to be disposed of in such manner as is herein provided."

The word "thousand" appearing in brackets is not in the bill as enrolled and signed by the governor, but was contained in the original bill. It is obvious that unless it shall be held that there must be absolute correspondence between the bill as enacted and as enrolled and signed by the governor, and that no deviation of a word can be permitted and yet the act stand, this legislation is valid.

It is perfectly manifest that the legislature by this proviso appropriated $50,000 for the purpose of purchasing, erecting, and equipping the necessary buildings, and it is equally obvious that that $50,000 could not be subtracted from $175, and that the $175 was plainly intended to mean $175,000 is again made manifest by the fact that in the same clause after appropriating $50,000 the legislature further appropriated a *remaining* $125,000 which must be a remainder after deducting $50,000 from $175,000. It is a clerical error which corrects itself and leaves nothing doubtful. Such clerical errors will not be permitted to defeat the plain intent of the legislature.

In 26 Am. & Eng. Enc. Law (2d Ed.), p. 549, it is said:

"The omission in the enrolled bill of words not essential to its substance or effect will not render the act invalid,"

Citing among other cases *People, ex rel. Gale*, v. *Supervisor of Onondaga*, 16 Mich. 254, in which case it was held by a majority of the court that where there was no error in the title of an act passed by the legislature a subsequent clerical mistake in the title as approved by the governor does not necessarily invalidate the act if it be such as to show by comparison that no one could be misled by it. In that case, as in this, the error was one which upon the whole face of the engrossed bill corrected itself. Again in *Stow* v. *Grand Rapids Common Council*, 79

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Mich. 595, where, by mistake, the title of an act as adopted by the legislature was an act to amend section 4 of Act No. 282 of the Local Acts of 1887, and where the title also contained further detailed reference to the subject-matter so that there could be no mistake as to the legislative intent in that regard, and where, after the passage of the act, the figures "1877" were substituted for the figures "1887," it was said:

"The making of it 1877 was in harmony with the rest of the title, and but the correction of a clerical error—a correction which would be permissible in a deed or contract, and which the law would make in default of any other action."

The case is closely analagous to the case under consideration. See, also, *Attorney General, ex rel. Fuller*, v. *Parsell*, 100 Mich. 170; *Sharp* v. *Merrill*, 41 Minn. 492.

The writ of mandamus will issue as prayed.

MCALVAY, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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HELME *v.* BOARD OF ELECTION COMMISSIONERS OF LENAWEE COUNTY.

1. ELECTIONS — SECRET BALLOT — VOTING MACHINES — STATUTES — CONSTITUTIONAL LAW.

   Section 10, Act No. 287, Pub. Acts 1907, under which a voter at an election at which voting machines are used is required to call for a paper ballot in case he desires to vote for a combination of candidates which cannot be voted on the machine, requires the voter in such case to disclose his intention not to vote his party ticket, and is therefore unconstitutional as violating the right of the elector to vote a secret ballot.

2. SAME — VOTING MACHINES — SECRET BALLOT.

   Voting machines cannot be used at an election at which the type of machine in use cannot be so arranged as to afford the voter opportunity to vote for any desired combination of the candidates of all parties.

3. SAME — OFFICIAL BALLOT — SPECIAL ELECTION — NOMINATION BY SEVERAL PARTIES.

   Act No. 272, Pub. Acts 1907, providing for the election of delegates to the constitutional convention of 1907, makes the provisions of the general election laws applicable so far as the printing of the ballots is concerned, and therefore a candidate is entitled to have his name appear but once on the official ballot, notwithstanding he is nominated by several parties.

ON MOTION FOR REHEARING.

ELECTIONS — VOTING MACHINES — SECRET BALLOT.

Any type of voting machine may be used, or the type in question in this case may be used, at any election in which the choice between candidates can be expressed by the use of the machine, or by any other method which does not disclose to the inspectors or others the purpose of the voter.

Mandamus by James W. Helme to compel the board of election commissioners of Lenawee county to furnish printed paper ballots. Submitted September 11, 1907. (Calendar No. 22,465.) Writ granted September 11, 1907. Rehearing denied October 11, 1907.

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James W. Helme (*T. M. Joslin*, of counsel), in pro. per.

John E. Bird, Attorney General, and *Thomas Ambrose Lawler*, Assistant Attorney General, for respondent.

PER CURIAM. The relator is a candidate selected by three parties as delegate to the coming constitutional convention. He asks a mandamus to compel the board of election commissioners of Lenawee county to furnish to each voting precinct in the county printed paper ballots containing his name under the party name of each and every party by which he was nominated.

The record shows that voting machines are used in several precincts, and that it is the intention to use such at the election to be held for said office, and that it is impossible to so arrange the names of candidates upon said machines as to permit a voter to vote for certain combinations of candidates, there being three to be elected. It is admitted that this is true in a strict sense, but it also appears that where a voter desires to vote for such a combination or candidate whose name is not on the machine, he may apply to the election inspector for a paper ballot, which, after preparing, he shall fold and deliver to the inspector, who shall place it in a cartridge and introduce it into a receptacle prepared for it in the machine, and through that into a box, to be counted if it shall be found that the persons voted for could not otherwise have been voted for by the use of the machine.

It is obvious that a voter cannot ask for and vote such a ballot without indicating that he does not vote for his full party ticket, and, to the degree that he is reluctant to have his want of party fealty known, it acts as a deterrent to his voting for the persons of his choice, and operates against his independence as a voter. We are of the opinion that the requirements found in section 10, Act No. 287, Pub. Acts 1907, are unconstitutional as applied to this case because they violate the right of the elector to

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vote a secret ballot. See *People* v. *Cicott*, 16 Mich. 283, and *City of Detroit* v. *Board of Election Inspectors*, 139 Mich. 548.

It appearing that all of the machines in use in this county are subject to this infirmity, i. e., they do not afford an opportunity to all to vote a secret ballot, they cannot lawfully be used, and it is therefore necessary that paper ballots be furnished by respondents for each precinct.

Counsel for relator contend that Act No. 272, Pub. Acts 1907, renders the general act providing for the printing of ballots, and prohibiting the printing of a name more than once, inapplicable to this election, inasmuch as it provides in express terms that—

"The names of the three candidates nominated by each or any political party in each senatorial district, * * * shall be printed upon the official ballots of the various political parties."

We think otherwise. Section 4, Act No. 272, Pub. Acts 1907, provides that—

"All laws not inconsistent with this act, regulating the printing of the ballots * * * shall be applicable to the printing of the ballots," etc.

The general law contains a similar provision, with the limitation mentioned, which we think applicable here. Therefore relator's name can appear but once.

The writ will issue as above indicated.

ON MOTION FOR REHEARING.

PER CURIAM. A motion for a rehearing of this cause has been made, and it is asked that, in case such relief shall not be granted, we indicate, by an addendum to the opinion filed, that the device shown by an amended return which is said to enable the voter to cast his ballot with absolute secrecy, is not open to the objection stated in the opinion heretofore filed. In view of the far-reaching effect of our decision, and the important interests, both

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public and private, which might be injuriously affected by any general misapprehension of its scope, we deem it proper to say that it was not intended to hold or intimate that the voting machine in question was open to objection in any election in which the choice between candidates can be expressed by the use of the machine, or by any other method which does not disclose to the inspector or others the purpose of the voter.

It follows that any device which insures absolute secrecy is not within the mischief condemned by our opinion.

POTTER v. DEUEL.

149 393
154 471

1. ELECTIONS—NOMINATIONS—PARTY COMMITTEES—COMPOSITION—CONTROL BY COURTS.

   In the absence of controlling legislation, the composition of a political committee according to the custom and usage of the party, with the sanction of the conventions of the party, will not be disturbed by the courts.

2. SAME—CONVENTIONS—PROXIES—STATUTORY PROVISIONS.

   Section 11466, 3 Comp. Laws, forbidding delegates to political conventions from giving proxies, and requiring vacancies to be filled by the delegation, if applicable to a meeting of a district committee called for the purpose of filling a vacancy on the ticket, is not violated where the committee by majority vote seat a citizen of an otherwise unrepresented county, who presents a proxy from the committeeman from that county.

Mandamus by Fred N. Potter to compel Andrew L. Deuel and Victor D. Sprague, chairman and secretary of the 29th senatorial committee, to certify the nomination

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of Alonzo B. Green as a candidate to the constitutional convention. Submitted September 11, 1907. (Calendar No. 22,464.) Writ denied September 12, 1907.

O'Brien & Francis, for relator.

Frost & Sprague and *Halstead & Halstead*, for respondents.

PER CURIAM. A convention of the electors of the twenty-ninth senatorial district on August 13, 1907, at the city of Cheboygan, nominated three candidates for delegates to the constitutional convention, one from Otsego, one from Presque Isle, and the other from Alpena county. The candidate from Alpena county declined the nomination. Thereafter, at a meeting of the senatorial committee, two candidates to fill the vacancy were voted for, and one of them, A. L. Deuel, of Petoskey, was declared to have been elected. The relator, a member of said senatorial committee, asks for a writ of mandamus to the chairman and secretary, respectively, of the said committee, commanding them to certify the election of Alonzo B. Green, of Alpena, to fill said vacancy, and to the county clerks of the counties composing said district, commanding them to desist from placing the name of said Deuel upon the official ballot; and if it be determined that said Green was not legally elected to fill the vacancy, that the members of said senatorial committee be commanded to assemble and proceed to nominate a candidate to fill the vacancy. It is alleged that said committee consists of six members, one from each of the counties of Alpena, Presque Isle, Montmorency, Otsego, Cheboygan, and Emmet; that Deuel, the acting chairman, and Sprague, the acting secretary, of said senatorial committee, were not members of said committee; that at the election held by said committee to fill said vacancy there were present the committeemen from Presque Isle, Montmorency, Otsego, Cheboygan, and Alpena; that said Deuel and said Sprague also attended, as did also H. S. Babcock, the proxy of the

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committeeman from Emmet; that in voting for a candidate to fill said vacancy said Deuel and the said Babcock voted, seven votes in all being cast, of which Alonzo B. Green received three and the said Deuel received four votes.

Upon the petition of the relator and the answer thereto, the parties have proceeded to hearing. The facts set up in the answer, so far as they are responsive to the allegations of the petition, for the purposes of this hearing, must be taken as true. It appears from the answer that the senatorial committee consists of eight instead of six members, and that for many years it has been the custom and usage of the republican party of said senatorial district to have a committee of eight members, composed of a chairman and secretary and a member from each county; that by a like custom and usage the candidate for senator has been authorized and empowered to appoint a secretary and a chairman of the committee; that at the senatorial convention held on the 31st of May, 1906, at the city of Petoskey, the usual motion was made and carried that the usual committee of eight be appointed, and the candidate nominated for State senator was authorized and empowered to appoint a chairman and a secretary of said committee. Six members of the committee from the different counties were elected and the nominee of the convention appointed as chairman A. L. Deuel, and as secretary Victor D. Sprague. These gentlemen as chairman and secretary, respectively, certified the nomination of said candidate for senator and performed the duties of chairman and secretary of said committee during the succeeding campaign and until now. As chairman and secretary, they called the convention to nominate candidates as delegates to the constitutional convention, and certified the nominations made at that convention to the secretary of State and the probate judges and county clerks of the various counties in said district. When Mr. Babcock presented himself as the proxy of the regular committeeman from Emmet county, relator objected to his being

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allowed to vote. The chairman ruled that he was entitled to represent Emmet county on the committee,—

"And the committee thereafter approved the action of said chairman in seating said Babcock as a member of said committee and seated Mr. Babcock accordingly; that only two members of the committee voted against Mr. Babcock being allowed to vote. * * * Mr. Babcock did not vote, neither did the secretary."

It appears further that the nomination of said Deuel to fill said vacancy has been certified by the committee to the secretary of State and to the judge of probate and county clerk of each of the counties of said senatorial district, and that ballots have been printed accordingly.

The writ must be denied. In the absence of controlling legislation, the composition of the committee according to the custom and usage of the party with the sanction of the conventions of the party will not be disturbed by courts. We are referred by counsel for relator to no such statute. See *Stephenson* v. *Election Com'rs*, 118 Mich. 396 (42 L. R. A. 214); *Jennings* v. *Election Com'rs*, 137 Mich. 720.

Assuming that Mr. Deuel was a member of the committee, a majority of the committee voted to seat Mr. Babcock. We are referred to 3 Comp. Laws, § 11466, which forbids a delegate elected to any city, county, congressional, or State political convention to give a proxy to any person to represent him at such convention, and requiring such vacancies occurring in any delegation in any such convention to be filled by a majority vote of said delegation, etc. The statute does not in terms refer to such a convention as the one whose proceedings are before us. And if it can be said that the senatorial committeemen should be treated as delegates to a convention to elect a candidate, it still appears that there was a vacancy occasioned by the absence of the delegate from Emmet county which was filled by the delegation itself by seating a citizen of that county.

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DELRAY LAND CO. *v.* TOWNSHIP OF SPRINGWELLS.

1. TAXATION—STATE TAX COMMISSION — GENERAL REVIEW — RECORD—CERTIFICATE—SUFFICIENCY.

   Where the notice of general and special review, published by the State tax commission under Act No. 154, Pub. Acts 1899, fixed September 28th as the time of the review, and the certificate made October 10th states that the review was had September 28th and 30th and on October 8th and 10th, and both the certificate and the record of the proceedings of the board are silent as to adjournments, the certificate is insufficient for uncertainty, and increased assessments based thereon are void as to the increase, since it cannot be presumed that the review certified to have occurred October 10th was under the notice for September 28th.

2. SAME—ADJOURNMENTS—PAROL EVIDENCE—SUFFICIENCY.

   Testimony by the presiding officer of the board and the minutes of an unofficial stenographer, transcribed long after the record of the action of the board was made, to the effect that at the close of each day's proceedings an adjournment was publicly announced to the date of the next session, will not serve to validate the certificate and record, in which no adjournments are shown, since such a holding would be permitting the levy and assessment of taxes to be founded upon parol.

Appeal from Wayne; Hosmer, J. Submitted June 15, 1906. (Docket No. 114.) Decided September 20, 1907.

Bill by the Delray Land Company, Limited, and others, against the township of Springwells, Harry Stansfield, supervisor of said township, and the board of State tax commissioners, to set aside certain assessments. From a decree for complainants, defendant board appeals. Affirmed.

Russel, Campbell & Bulkley and *Angell, Boynton, McMillan & Bodman*, for complainants.

John E. Bird, Attorney General (*Charles W. McGill* and *Fred N. Twiss*, of counsel), for defendant board of State tax commissioners.

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MCALVAY, C. J. Complainants, who are the owners of certain real estate situated in the township of Springwells, Wayne county, filed a bill in chancery alleging that the action of the defendant board of State tax commissioners by a general review of the assessment roll of said township for the year 1903, in making a horizontal raise upon the entire lands upon said roll (except certain properties specially reviewed) of 125 per cent. over the assessments as made by the supervisor, is illegal and void, a cloud upon complainants' title, fraudulent and unconstitutional. The bill prays that such assessments so fixed by said board may be decreed void, and all proceedings thereunder, in so far as they purport to create a lien upon complainants' lands, or a personal obligation against them, be canceled and set aside and the cloud removed from their title; that the assessments of the supervisor be decreed to be the only correct basis for levying taxes upon said lands.

The action of the defendant board was taken under sections 152 and 153 of the general tax law (Act No. 154, Pub. Acts 1899) and the orders and certificates made upon the general and special reviews and the certificates attached to the roll by said board of its action under said sections in form and substance are the same as those considered by this court in *Bialy* v. *Bay City*, 139 Mich. 495. In the case at bar the claim is made as is made in the *Bialy Case*, supra, that the certification by the board was not sufficient, by reason of uncertainty, and that the cases cannot be distinguished. It is urged on the part of defendant board that the cases are distinguishable in that there is testimony in the record in this case which shows that at the close of each day's proceedings an adjournment was publicly announced to the date of the next session.

The notice published under the statute fixed the review to be held September 28th. The certificate made October 10, 1903, states that the review was had on the 28th and 30th of September and the 8th and 10th of October, 1903. The only notice of this general review was the one pub-

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lished fixing the review for September 28th. The testimony shows that an oral adjournment was had from time to time until October 10th, when the board finally adjourned. Section 146 of the tax law requires an official record of all the proceedings of the board. This record is silent as to these adjournments, as is also the certification of the board. The proofs of the adjournments rest in the testimony of the presiding officer of the board and the minutes of a stenographer (not official) which were transcribed long after the record of the action of the board in this matter was made.

We do not think that this case is distinguishable from the *Bialy Case*, and hold that the certification is not sufficient, by reason of uncertainty. We said in that case:

"We cannot presume that the review certified to have occurred October 6th was under the notice for September 19th. The record made by the board does not warrant such presumption."

To hold otherwise would be permitting the levy and assessment of taxes to be founded upon parol. This cannot be done. 1 Cooley on Taxation (3d Ed.), p. 576; *Moser* v. *White*, 29 Mich. 59; *Rogers* v. *White*, 68 Mich. 10, and cases cited.

Other questions of interest and importance which are discussed in the briefs of able counsel need not be considered, except as to the relief to which complainants are entitled. Upon this matter we agree with the learned circuit judge who heard the case, and hold that the tax is void as to the excess created by the action of the board of State tax commissioners over and above the original assessment. *Avery* v. *City of East Saginaw*, 44 Mich. 591; *Bialy* v. *Bay City*, 139 Mich. 495.

The decree of the circuit court is affirmed, with costs of this court.

GRANT, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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CLARK *v.* GRAND TRUNK WESTERN RAILWAY CO.

1. RAILROADS—FIRES—CAUSE OF FIRE—EVIDENCE—SUFFICIENCY.
   In an action against a railroad company for damages caused by fire alleged to have been set by its locomotive, evidence examined, and *held*, circumstantially sufficient to go to the jury on the issue whether defendant's locomotive set the fire, there being proximity of time and place.

2. SAME—NEGLIGENCE—LOCOMOTIVE—EQUIPMENT AND MANAGEMENT—UNCONTRADICTED EVIDENCE—EFFECT.
   In an action against a railroad company for damages caused by fire set by its locomotive, testimony for defendant to the effect that the locomotive was properly equipped and managed, if uncontradicted, is conclusive, under section 6295, 2 Comp. Laws, and is not to be measured against an alleged presumption of improper equipment or of improper management arising upon the fact that the locomotive set the fire.

3. SAME—WILLFUL INJURY—CUTTING FIRE HOSE—LIABILITY OF COMPANY.
   Where a fire hose is necessarily laid across a railroad track for the purpose of extinguishing a fire, and trainmen, with warning of the presence of the hose, unnecessarily run upon and cut it, the railroad company is liable for the property destroyed in consequence of the delay in procuring water caused by that act; but the company's servants are not chargeable with negligence in not looking for and discovering the hose, and an instruction which bases liability on constructive knowledge of the presence of the hose is erroneous.

Error to Eaton; Smith, J. Submitted October 9, 1906. (Docket No. 24.) Decided September 20, 1907.

Case by Sarah P. Clark against the Grand Trunk Western Railway Company for negligently burning plaintiff's buildings. There was judgment for plaintiff, and defendant brings error. Reversed.

In three counts of plaintiff's declaration it is charged that fire from one of defendant's locomotive engines was

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negligently cast upon and set fire to the premises of plaintiff. In a fourth count the charge is that the same premises being found to be on fire, the fire company of the city had attached a hose to a nearby hydrant, laid the hose across the defendant's tracks, in a street there crossing said tracks, and was about to and could easily have extinguished the fire but for the act of servants of defendant in negligently running another locomotive engine and cars over and upon the hose, cutting and destroying it, delaying the firemen until the conflagration had reached a stage where it could not be controlled. The plea was the general issue. The case went to the jury upon both charges and a general verdict for plaintiff was returned, upon which judgment was entered. The substance of all the evidence given upon the trial is returned, and the errors assigned, and relied upon by counsel for defendant, present three principal questions:

(1) Whether there is any evidence that defendant set the fire.

(2) Whether the evidence that the engine was in proper condition and properly managed (2 Comp. Laws, § 6295) required the trial court to withdraw the question of its condition and management, and the one of defendant's liability for setting the fire, from the jury.

(3) Whether there is any evidence of negligence in cutting the fire hose, and, if there is, whether there is resulting liability to pay for the damage done by the fire.

H. Geer, for appellant.

Barger & Hicks and *Frank A. Dean*, for appellee.

OSTRANDER, J. (*after stating the facts*). 1. The fact that the fire was set, as alleged, must be proved; not, necessarily, by the testimony of an eyewitness, but by evidence which reasonably leads an inquiring and unbiased mind to the conclusion that a cinder from the particular engine caused the fire. The evidence is not sufficient if it establishes no more than that the fire might so have been set.

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"The origin of a fire under such circumstances must be established so as to produce conviction, to a reasonable certainty, on an unprejudiced mind, the same as any other fact; and, until there is evidence to so establish it, the defendant is not called upon to prove that the fire was not caused as alleged." *Finkelston* v. *Railway Co.*, 94 Wis. 270.

The evidence presented to support the inference that the fire was set, as alleged, is in substance here stated, and, where there are variations, in form most favorable to plaintiff. The defendant's tracks run, at the place in question in the city of Charlotte, from the northeast to the southwest, and plaintiff's premises are south and east of the tracks. On the morning of November 9, 1903, an alarm of fire was turned in at about 1:48 o'clock, by whom is not shown, and a fire was discovered by those who responded to the alarm in the southwest corner of a shed 70 feet long and from 15 to 20 feet high from ground to peak of roof, running substantially parallel with defendant's tracks and connected with a larger and main building by a covered passage and a door. There were grass and papers and other debris along the right of way and near the shed which was about 35 feet from the track on which the train, hereinafter referred to, was running. It is not claimed, however, that the fire was set otherwise than by a cinder or spark carried in the air to or upon the shed. The wind was blowing quite strongly from the southwest—that is to say, up the right of way in a direction opposite to the one the train was moving. It was very dry, the shed was built of wood, was old and dry. The shingles were warped.

"I could not tell whether the fire was on the side of the building next to the railroad or whether it was on the top of the building. * * * The blaze was coming from the southeast (probably meaning southwest) corner of my rim shed. * * * It was apparently all on the outside of the building or near the roof or on the roof. * * * It was in the southwest corner of the shed. I first discovered the fire in the southwest corner of the rim shed.

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* * * It seemed to be in the southwest portion of it. * * * In the southwest corner of the rim shed. A small blaze was on the outside of the building and seemed to be eating towards the roof. * * * It was in the corner of those sheds. * * * I couldn't say where the fire was in reference to this building except that I knew it was in the end of the rim shed somewhere. * * * Was on the south and west side of those sheds. * * * There was some fire on top. I didn't think there was any on the inside. I didn't go in. * * * In the southwest corner of the sheds. * * * It was on the outer portion of the works next to the track and in the roof. * * * The fire had started in the rear of the building at the southwest corner. * * * The fire was in the southwest corner of the rim shed; apparently on the outside of the building, running up into the roof."

These are statements of various witnesses for plaintiff, including the owner, her employé, and the firemen, about the position of the fire when first seen by them. About 15 or 20 minutes before the alarm of fire was given, a passenger train went west on defendant's road. None of plaintiff's witnesses saw it. There is testimony to the effect that the engine was puffing very hard and seemed to be going fast; this from witnesses who were, at the time, indoors. No one on the train saw any fire in plaintiff's shed. No evidence was introduced on the part of the plaintiff to prove the condition, equipment, or management of the locomotive. Plaintiff's premises, the rear of which abuts upon the railroad right of way, are near the intersection of Sheldon street and Foote street, about 800 feet to the west or southwest of the railroad station. There are a number of buildings used for residences and for other purposes in the immediate vicinity. No testimony was introduced tending to prove that the fire was set in any way other than as claimed by plaintiff. Counsel for plaintiff argue that the testimony introduced by defendant upon the subject of the integrity and management of the locomotive on the night in question furnished, some of it, support for inference that the fire originated in the manner alleged in the declaration. We need not set

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it out because we have already made it appear that we should not say there is no testimony upon the subject to go to the jury under proper instructions. The locomotive carried fire. The testimony is that an engine in first-class condition and properly managed will emit sparks. The conditions described were favorable to the setting of such a fire as was discovered. There was proximity of time and of place.

2. The testimony for defendant to the effect that the locomotive was properly equipped and managed is not contradicted and is conclusive unless, as counsel for plaintiff insist, it is to be measured against an alleged presumption of improper equipment or of improper management arising upon the fact that the locomotive set the fire. This court has recently construed and applied the statute, 2 Comp. Laws, § 6295, adversely to the contention of the plaintiff here. *Dolph* v. *Railway Co.*, ante, 278. If upon the whole case there is room for inference, based upon evidence, that equipment was defective or that management was improper, the case is for the jury. Whether in any case the fact of setting a fire would be any evidence of infirmity of apparatus or of improper management, must depend upon other facts and circumstances, in evidence.

In the case at bar, no peculiar conditions calling for any unusual care in managing the locomotive were present. Counsel say a conflict of evidence is made by, or room for inference of defective equipment or improper management found in, (1) the testimony of the fireman that he put in coal while passing through Charlotte, the open door of the fire box tending to increase the draft; (2) the evidence that the engine had not before or after the occasion set fires; (3) because the engineer did not inform the jury about "where were the levers," how wide open was the throttle, how he was handling the engine, what he was doing to it, were the drivers slipping opposite the premises in question, how heavy was the train, how much steam was used; (4) the testimony of defendant's

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experts that an engine in good repair could not throw sparks a distance of 30 feet and set a fire; (5) the testimony of two of plaintiff's witnesses who heard the train and thought it was going fast, though the engineer said it was running no faster than 12 miles an hour; (6) the evidence that the slipping of the drivers and the weight and speed of the train would be facts indicating whether sparks were given off in greater or smaller quantity. Some of these claims are altogether unsupported by the record, as will be pointed out. Briefly summarized, the testimony on this point is as follows:

The train in question reached Charlotte at 1:27 a. m., leaving at 1:30; its engine, numbered 988, was assigned to the defendant by the Grand Trunk Railway Company of Canada in May, 1903, and had been thereafter used to draw passenger trains between Port Huron and Chicago; the engine had a spark arrester, made of No. 10 wire, with meshes 2½ by 2½ to the square inch, which is as small as experience shows can be used and have an engine steam properly; each engine was washed out after being run 1,000 miles, and a thorough examination made of the fire boxes, netting, smokestack, etc.; there is also a monthly inspection of all engines and the fire boxes and the dampers are examined before every trip. Engine No. 988, according to a record kept by defendant, had her first washout May 17, 1903, and was then in first-class condition as to nettings, diaphragm plates, baffle plates, fire box, and smokestack. A record produced at the trial showed an inspection on November 6, 1903, which disclosed smokestack, netting and plates, ash pans and dampers in good condition. A further inspection was made November 16, 1903, at which time it was in good condition. The engineer in charge on the morning of November 9, 1903, testified that on that trip, which began at 9:00 p. m. on November 8th, at Port Huron, the engine was in good condition; that it was running no faster than 12 miles an hour as it passed plaintiff's premises, and that he was handling it in a careful manner. His next trip on

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the engine was on November 14th, and at that time it was in good condition. Meantime, and on the night of November 9th, another engineer took the engine out and found it in first-class condition. The fireman testified that on the morning in question, on leaving the station at Charlotte, and following his usual custom in leaving a station, he put in from five to seven shovels of coal, which would have a tendency to smother the fire, cause more smoke to escape, but no sparks.

There is no testimony that an engine in good repair, equipped as this engine was, will not throw sparks 30 or 35 feet and set a fire. The testimony, that of the master mechanic, is:

"*Q.* Do you think an engine on your road, in good repair, properly handled, would emit sparks through this device with sufficient life to set fire?

"*A.* I hardly think so.

"*Q.* Your opinion is, as a master mechanic, an engine on your road, equipped with this device in good shape, would not throw sparks of sufficient vitality to cause a fire?

"*A.* It is possible that they would in some instances.

"*Q.* What would you say now as to whether an engine upon your road equipped with the spark-arresting device which you have described, in good repair and properly handled, would throw live sparks and cinders a distance of 30 or 40 feet and the cinders retain enough vitality or life to set a building on fire, if dry?

"Objected to as being guesswork. Objection overruled. Exception for defendant.

"*A.* If it would do this I wouldn't think there would have to be anything the matter with the engine. However, if there was a hole in the screen it would have more of a tendency to emit sparks than otherwise."

The undisputed testimony is, too, that this locomotive had, so far as was known, never before and never since set a fire.

The other contentions noted are disposed of by what has already been said, except, perhaps, the one that the engineer did not, in detail, state how he was managing the

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engine. He had had 15 years' experience as engineer, the testimony showing him to be a first-class man. While proper management, to excuse liability, is a fact to be shown affirmatively, the omission to relate some small detail of management will not be regarded when counsel for plaintiff do not call for it and when neither the court nor jury can know or assume that the missing detail is material. He did state the speed at which he was running, said that he was not in haste, having plenty of time, that his engine was all right, and that he was running her in a careful manner, but had no particular recollection what he did on that night different from any other night. Defendant's evidence is conclusive that machinery, smokestack, and fire boxes were in good order and properly managed, unless it can be said that the mere fact that a fire was set by the engine in plaintiff's building 35 feet from the track is conflicting evidence. For reasons which have been stated, we are of opinion there was no conflict in the evidence.

3. A wagon carrying 800 feet of hose was used by the fire department and driven north on Sheldon street to Foote street, which makes, with Sheldon, a right angle. On the corner is a hydrant. One of the firemen alighted and connected the hose to the hydrant, the wagon meantime turning west into Foote street, laying the hose behind it and crossing the tracks of defendant's road, which were laid diagonally across the street. It seems to have been the plan to approach the fire from Foote street and the right of way of defendant. Defendant has more than one track at this point and the hose wagon passed some 15 or 20 feet beyond them before stopping. A freight train was at the moment slowly approaching this crossing from the west and it ran upon and cut the hose before water had been turned on, and before the hose could be disconnected and removed. This cutting of the hose is said to have been an act of negligence, resulting in such loss of time that it may be considered the proximate cause of plaintiff's loss. As we have con-

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cluded that the case was improperly submitted to the jury upon the first ground of recovery declared upon, and as it is not possible to tell upon which of the grounds declared upon the jury gave its verdict, the judgment must be, in any event, reversed, and a new trial granted. *Leitch* v. *Railway Co.*, 93 Wis. 79; *Patton* v. *Wells*, 121 Fed. 337. It is proper to say, however, and we are of the opinion, that upon a new trial, if the evidence shall satisfy the jury that there was no other efficient way to procure water to extinguish the fire, the hose was rightfully laid across the tracks. If defendant's servants, in charge of the freight train, had notice and warning of the presence of the hose on the tracks (they deny having any notice), and had no occasion for haste, and might have stopped the train, instead of doing which they carelessly ran upon and cut the hose, and the cutting of the hose occasioned such delay in procuring water that the destruction of plaintiff's property was the direct and necessary result of such carelessness, plaintiff may recover upon the second ground set up in the declaration such damages as were consequent upon such delay. *Metallic Compression Casting Co.* v. *Railroad Co.*, 109 Mass. 277; *Little Rock Traction & Electric Co.* v. *McCaskill* (Ark.), 70 L. R. A. 680. Defendant's servants cannot, however, be charged with negligence in not looking for and discovering the hose. Whatever the true rule may be in this regard in cases of traction companies operating a railway in the streets of a city, it would be a hard rule which required those in charge of trains on steam roads to watch for and discover, especially in the night, such obstructions upon the track. In the cases cited, as in *Mott* v. *Railroad Co.*, 1 Rob. (N. Y.) 585, in which a different rule is laid down, the hose was, when cut, filled with water and the plaintiff, in each case, immediately deprived of a means of putting out the fire. In the present case, the hose was attached to the hydrant and a man stood ready to turn on the water when he should receive the signal so to do. So far as the question of proximate cause is concerned, the

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same rule should be applied in both cases. The court was in error in giving the jury the following instruction:

"To entitle the plaintiff to recover on this branch of the case, you should be satisfied by a preponderance of the evidence that Mr. Martin, the engineer in charge of the freight train, knew or ought to have known that the hose was across defendant's track, and that such knowledge was brought, or should have been brought, to his attention by reasonable diligence on his part in time for him to have stopped his train before reaching the hose lying across the defendant's track."

Objections were made to the argument of counsel for plaintiff to the jury and they are pressed in this court. It is not likely the same situation will be again presented, and we need make no comment.

The judgment is reversed, and a new trial granted.

GRANT, J., concurred with OSTRANDER, J.

BLAIR, J. We concur as to the third point. As to the second point we think there was a question of fact for the jury.

MONTGOMERY and HOOKER, JJ., concurred with BLAIR, J.

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HOLMES *v.* LOUD.

1. TAXATION — TAX TITLES — REDEMPTION — PERSONS ENTITLED — WAIVER BY TAX TITLE HOLDER.

   By accepting from the holder of the original title to lands the amount of the tax, together with the 100 per cent. and costs, and deeding the land to him, a tax title holder waives his right to raise the question whether the holder had a right to redeem on account of the deeds under which he claims not being recorded.

2. ASSIGNMENTS — RIGHTS ASSIGNABLE — ACTION FOR TRESPASS — TREBLE DAMAGES.

   The right of action for treble damages for cutting timber, given by section 11204, 3 Comp. Laws, arises from an injury to the estate, and not to the person; of the owner, and would pass to the personal representative of a deceased owner, and is therefore assignable.

3. TAXATION—TAX TITLE — REDEMPTION — TIME — EXPIRATION OF PERIOD—SERVICE OF NOTICE.

   Sections 140, 141, and 142 of the general tax law (1 Comp. Laws, §§ 3959, 3960, 3961) are to be construed together, and the periods of six months mentioned in each of them are coterminous, whence it follows that under section 142 a tax title purchaser is not entitled to possession until six months after the *return* of service of the notice to redeem provided by section 140, and a purchaser entering before the expiration of that period is a trespasser.

4. TRIAL—ARGUMENT OF COUNSEL—PREJUDICE.

   Where plaintiff's counsel, in his argument to the jury, commented upon the wealth, character, and influence of defendants, charged witnesses with holding appointments secured by defendants and with being under defendants' influence and not daring to testify against them, charged defendants and their employés with coercing a witness with a political job to win, and made many other statements of a like character, the judgment will be reversed.

Error to Alpena; Emerick, J. Submitted October 19, 1906. (Docket No. 103.) Decided September 20, 1907.

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Trespass quare clausum fregit by George B. Holmes and John Nicholson, copartners as Holmes & Nicholson, against Henry N. Loud, George A. Loud, and Edward F. Loud, copartners as H. M. Loud's Sons Company. There was judgment for plaintiffs, and defendants bring error. Reversed.

De Vere Hall, for appellants.

Joseph H. Cobb, for appellees.

MCALVAY, C. J. Plaintiffs sued defendants in the circuit court of Iosco county to recover damages for injury to the freehold of certain lands asserted to be owned by them, such injury having been caused by defendants wrongfully entering upon said lands and cutting down and carrying away the timber standing thereon. Plaintiffs declared in trespass upon section 11204, 3 Comp. Laws, which provides for the recovery of treble damages. By stipulation the case was transferred to and tried in Alpena county. A verdict was rendered in favor of plaintiffs for $3,461.60. Certain special questions were answered by the jury, by which it was determined that a judgment for treble damages could not be entered, and judgment was duly entered for the amount above given, assessed by the jury.

Upon the errors assigned by defendants, the first proposition discussed is that plaintiffs could not maintain this action, for the reason that at the time the alleged trespass and injury were committed they had no such title to the premises, or right under the assignment of right of action, as would entitle them to a recovery.

The claim of plaintiffs to the title of these lands was the original title from the United States through regular transfer to Jonathan L. Clutton, and by conveyances from Clutton to Hannah Vaughn, February 9, 1899; from Hannah Vaughn to Fred P. Obenauer October 22, 1902; from defendant H. N. Loud to Obenauer February 10, 1903; from Obenauer and wife to plaintiffs November

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30, 1903. Plaintiffs also had a bill of sale from Obenauer dated October 2, 1902 (claimed by Obenauer in his testimony this date was an error and should be October 22), of all standing timber on said lands removed prior to April 1, 1906, and also an assignment of all right of action to recover for the timber cut and removed by defendants, and for all damage to the freehold committed by them, dated December 16, 1903.

Defendants, for their right to enter and take timber from the land, relied solely upon a purchase from the State, represented by a tax deed, claiming that due notice had been served upon Jonathan L. Clutton, the holder of the last recorded title, on July 25, 1902, and that the statutory six months in which he could redeem expired January 25, 1903. The record shows that the sheriff's return of such service was duly filed August 23, 1902. The jury, in answer to a special question, found that defendants cut the timber between January 25, 1903, and February 10, 1903.

Plaintiffs in their declaration set up the assignment of the right of action relied upon. This suit was commenced February 1, 1904. The court held that there was no evidence in the case disputing the proofs of plaintiffs that Obenauer acquired the original title from Hannah Vaughn, the grantee of Clutton, October 22, 1902. The record supports such holding. None of the conveyances to plaintiffs were claimed by them to have been recorded, except the deed from Clutton to Hannah Vaughn, which, on May 12, 1900, at 6 o'clock p. m., was received and entered for record by the register of deeds for Montmorency county, and such receipt indorsed upon the instrument, but the same was not recorded in the books.

To the objection of defendants that, as the law then was, Clutton alone could redeem, the trial judge properly held that by accepting from Obenauer, who in fact was the holder of the original title at the time, the amount of the tax, together with the 100 per cent. and costs, on February 9, 1903, and deeding the land to him on the next

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day, defendants had waived all right to raise any question as to the regularity of the redemption, and he further held that the time of redemption did not expire until six months after the sheriff's return of service of the statutory notice had been filed. This was in accord with the holding of this court. *Pike* v. *Richardson*, 136 Mich. 414.

The assignment of the right of action is not attacked as to its form or substance, nor is it contended that a right of action for injury to one's estate is not assignable; but, that this action is to recover damages which are punitory or exemplary, and the right of action would not pass to the personal representatives of a deceased owner, and is therefore not assignable. We do not agree with the defendants. The injury, if any, was to the estate and not to the person of the owner, and would pass to the personal representatives of a deceased owner. The cause of action was assignable. *Gates* v. *Comstock*, 107 Mich. 546, citing *Final* v. *Backus*, 18 Mich. 218, 231, and *Grant* v. *Smith*, 26 Mich. 201.

Referring to the dates of service of notice and the filing of the return of the sheriff, it appears that the time of redemption would expire February 23, not January 25, 1903. It also appears that defendants entered upon the land January 26, and cut and removed timber until February 10, when they deeded to Obenauer, who had paid the amount required by law to redeem. Defendants urge that, under the law, section 142 (1 Comp. Laws, § 3961), they were entitled to possession of the land upon the expiration of six months after the *service* of the notice.

This court has construed sections 140 and 141 of the general tax law (1 Comp. Laws, §§ 3959, 3960), holding:

"That these two sections should be construed together, and that, so construed, the time for redemption is coterminous with the period during which the holder of the tax title may not take action. * * * And that, when personal

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service is referred to in section 141, a service completed by filing a return is intended." *Pike* v. *Richardson*, 136 Mich. 414.

The provisions of these two sections are set forth at length in the opinion in that case. Briefly quoting from them, we find that section 140 provides:

"No writ of assistance * * * shall be issued until six months after there shall have been filed with the county clerk of the county where the land is situated a return by the sheriff of said county, showing that he has made personal service, or until substituted service * * * has been made," etc.

Section 141 provides that the person who may redeem—

"Shall be entitled to receive from the person so claiming under and by virtue of such tax deed, at any time within six months after the personal service of such notice, or the date of mailing said notice by registered letter, * * * a reconveyance of such interest in such lands," etc.

Section 142, relied upon by defendants to support their entry upon the land, provides:

"No purchaser under any tax sale hereafter made, * * * shall enter into possession of the land so purchased until six months after he has given notice to the party or parties in interest as provided for in the preceding sections."

By its terms the construction of this section depends upon the construction already given to the preceding sections in *Pike* v. *Richardson*, supra.

Such construction gives harmony to the operation of the provisions of all of these sections, and gives expression to the clear legislative intent that the periods of six months mentioned in each of them should be coterminous. Under this construction defendants were trespassers. *Corrigan* v. *Hinkley*, 125 Mich. 125; *Huron Land Co.* v. *Robarge*, 128 Mich. 686; *Adkin* v. *Pillen*, 136 Mich. 682;

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Griffin v. *Kennedy*, 148 Mich. 583. The court therefore was not in error in holding that plaintiffs were entitled to recover and that the only question for the jury was to find the amount of the damages sustained by plaintiffs.

The questions raised upon errors assigned upon the admission or exclusion of evidence bearing upon the question of damages, in view of the fact that a new trial will be granted, need not be discussed. If error in this regard has occurred (which we do not concede) there is no probability that it will be repeated upon a new trial.

During the pendency of this case before this court, application was made by defendants to amend the bill of exceptions in order to show the prejudicial argument of plaintiffs' counsel on the trial of the case. The court made an order that the argument be printed as part of the bill of exceptions. The portions objected and excepted to cover too much space to be repeated. During the course of the trial the court cautioned plaintiffs' counsel as to making improper remarks, saying that he would let attorneys of experience take the consequences of such conduct, and that he would not attempt to cure such rank errors and save verdicts. Counsel did not profit by this caution, but in the argument to the jury went to an extreme, in the language used, which this court in its decisions has said cannot and will not be tolerated. This argument seems to have been purposely made to improperly influence the jury. The wealth, character, and influence of defendants were commented upon. Witnesses were charged as being under defendants' influence and not daring to testify against them. Witnesses were charged with holding appointments secured by defendants and therefore their testimony was unreliable. Defendants and their employés were charged with coercing a witness to do certain things with a political job to win. Many other statements were made of like character, grossly prejudicial to defendants. It is unnecessary to cite the cases where this court has held that such arguments constitute reversible

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error. All of these comments were uncalled for, and entirely outside of any evidence in the case.

The case is reversed on account of such prejudicial arguments, and a new trial is granted.

CARPENTER, GRANT, BLAIR, and MOORE, JJ., concurred.

MEAGHER *v.* COWING.

SALES — ACTION FOR PRICE — PASSING OF TITLE — REMEDIES OF SELLER.

Defendant ordered of plaintiff ten cars of crushed stone, which plaintiff shipped consigned to himself, and ordered the carrier to deliver to defendant. The cars were placed at defendant's order and after several days defendant learned that the stone was not suitable for the purpose for which he ordered it, and canceled the order. Plaintiff reshipped the stone to his place of business and sued for the price. *Held*, that on delivery of the stone, which conformed to the contract of sale, to defendant, the title passed to him, and that plaintiff had a right to retain the property for defendant and sue for the contract price and the necessary expense of removing same from defendant's custody. MOORE and BLAIR, JJ., dissenting.

Error to Saginaw; Gage (Chauncey H.), J. Submitted February 21, 1907. (Docket No. 66.) Decided September 20, 1907.

Assumpsit by Ignatius Meagher, William J. Meagher, and Nicholas Meagher, copartners as Meagher Bros., against John P. Cowing for goods sold and delivered. There was judgment for plaintiffs for less than the amount claimed, and they bring error. Reversed.

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Albert McClatchey, for appellants.

Weadock & Weadock (*Miles J. Purcell*, of counsel), for appellee.

MOORE, J. This is an action of assumpsit. The declaration was the common counts with a special count setting forth the terms of the contract involved in the cause, the violation thereof by defendant, and the nature of the damages sustained by plaintiffs. A bill of particulars was demanded and filed as follows:

"Please take notice that the following is a bill of particulars of the plaintiffs' demand in this cause and for the recovery of which this action is brought, to wit:

"852 yards of crushed stone, delivered at Saginaw		$475 20
Railroad company's charges for removing 10 car loads of stone from defendant's siding to place of unloading		199 98
Cost of unloading 10 car loads of stone		33 65
18 days' car service		18 00"

The plea was the general issue with notice to the plaintiffs that the defendant would show that the stone was not of the quality ordered, and was not suitable for the work for which it was purchased, and that plaintiffs well knew the work defendant intended to use it in and that it was not suitable.

After the plaintiffs had closed their proofs, the defendant moved for a verdict in his favor. The judge was of the opinion that the cost of unloading the stone was a proper charge against the defendant, and so instructed the jury. He also instructed them the charge of $18 for detention of cars was a proper charge against defendant. While he was doing this, counsel for defendant called his attention to the fact that there was no evidence that Mr. Cowing was in any way responsible for the detention of the cars, or that they were in his possession; we quote from the record:

"There isn't a scintilla of evidence as to how many days

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these cars were in Mr. Cowing's possession before they were notified to take those cars away. There isn't any evidence there—

"*The Court:* Well, the court can correct that afterwards.

"*Mr. Purcell:* Very well.

"*The Court:* Now your verdict should be in favor of the plaintiffs in this case for the sum of fifty-one dollars and sixty-five cents, under the undisputed evidence."

Counsel for plaintiffs asked the court to instruct the jury that plaintiffs might recover the amount of the freight bill from Alpena to Saginaw, $201.64, and from Saginaw to Bay City, $199.98, and also for 352 yards of stone at $1.35 a yard. The judge held plaintiffs could not recover any of the three items. Afterwards a motion was made to remit from the verdict the $18 for the reason that there was no evidence to support it. Notice of this motion was given to counsel for plaintiffs. He did not appear upon the hearing of the motion and the amount of verdict was reduced $18. The case is brought here by writ of error.

It will be observed that as to the item of $201.64, it does not appear in the bill of particulars, and we may dismiss it from further consideration. We think, too, in view of the fact that when the judge suggested that if there was no evidence upon which to base a verdict for the $18 item, he could afterwards correct it, and counsel made no suggestion of disapproval, and the further fact that when the motion was made he did not object, that his objection as to that item will not be heard now.

Counsel now say that, as there was no market for the stone at Saginaw, and they were compelled to take the stone to Bay City, they should have been allowed to recover the contract price of the stone, less its value in Bay City. If there was no other objection to this claim it would be a complete answer to it to say that there is no such claim in the bill of particulars.

The important question in the case is whether the title to the stone passed to the defendant so that plaintiffs are entitled to recover the full contract price therefor. Coun-

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sel contend with great earnestness this question should be answered in the affirmative, and cite many authorities which they claim sustain their position. Before the question can be answered intelligently it becomes necessary to learn what the facts are. The defendant was a contractor doing bridge and other work in the city of Saginaw. The plaintiffs live in Bay City dealing in coal, wood, masons' supplies and are agents for Alpena crushed stone. They received an inquiry by telephone about crushed stone from defendant; they told him they could supply him at $1.35 a yard f. o. b. at Saginaw, but would require a written order. He sent them one reading as follows:

"JOHN P. COWING, Contractor and Engineer,
"423–427 Citizens' Building, Cleveland, Ohio.
"Order No. 2341. Put this number on your invoice.
"SAGINAW, 10–18–'05.

"To MEAGHER BROS.,
"Bay City, Michigan.
"Please deliver via P. M. R. R. the following articles:

DESCRIPTION	CHARGE TO
10 cars crushed stone	Contract No. 18.

"Confirming order by Manary,
"JOHN P. COWING,
"Per R. A. CORRIGAN.

"Mail invoice immediately on shipment of goods. For each order render separate invoice, our number must appear on each invoice."

Upon receipt of the order it was sent to Alpena and the ten car loads of stone were sent forward billed to Meagher Bros., the last car was shipped on the 24th day of October, some of them reaching Saginaw as early as October 23d, upon which date the defendant telephoned the plaintiffs that the stone was at Saginaw, but the freight agent refused to deliver it to him because it was billed to Meagher Bros. The plaintiff said: "Why I can fix that all right; I will give the freight agent an order transferring those cars over to you." The defendant said, "All right." The plaintiff telephoned the freight agent to deliver the

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cars to the defendant and the freight agent said he would do so at once. The plaintiff also sent the following written order:

"BAY CITY, MICH., October 23, 1905.

"C. HARSCH,
"P. M. Freight Agent,
"Saginaw.

"*Dear Sir:* Kindly place all cars billed to us at Saginaw (crushed stone loads) on Wall and Webber's switch on orders of John P. Cowing, contractor.

"Yours very respectfully,
"MEAGHER BROTHERS."

And afterwards the defendant caused the railroad company to place a number of the cars on his siding. The plaintiffs heard no more of the matter until they received the following letter:

"SAGINAW, MICH., 10–25, 1905.

"MEAGHER BROS.,
"Bay City, Mich.

"*Gentlemen:* We have received on our switch at South Saginaw four cars of your stone. However, the stone is such a poor quality that we cannot use it in our construction, so therefore under the condition we will have to cancel our order of Oct. 18, '05, order number 2341. Please take this matter up as it will be to your interest to do so.

"Yours truly,
"JOHN P. COWING."

After receiving this letter plaintiffs' bookkeeper telephoned to William J. Meagher, telling him that the ten car loads of stone were at Saginaw and were refused by the defendant, and requested him to look after the matter as Ignatius Meagher, who had charge of the transaction up to this point, was away. William J. Meagher went to Saginaw to learn what the trouble was. On his arrival at Saginaw he talked with the city engineer before seeing the defendant, and was told by him that the specifications barred out Alpena stone. He then went to the defendant's superintendent, Mr. Manary, and was told by him that it was not crushed stone, but was refuse from the

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quarry and that they would not accept it. The parties had a quarrel. Three or four days later Mr. Meagher had the stone shipped to Bay City and unloaded. No effort was made to sell it in Saginaw and no statement was made to defendant's superintendent that the stone had been delivered and title had passed, nor was he consulted about what should be done with the stone. Upon the trial no proof was made as to the market value of the stone at Saginaw at this time.

Counsel says the stone was shipped to Bay City because the city was the principal user of crushed stone in Saginaw, and the city engineer, who was required to approve of all material used, told William J. Meagher that the specifications called for Bayport stone, and that he would not allow Alpena stone to be used in any city work, that the testimony shows that at the time defendant refused this stone there was no market anywhere for it, owing to the lateness of the season, and that it could not be sold at all unless some one would take it on speculation at 50 or 60 cents a yard for the purpose of holding it over until the next season, and that plaintiffs did not have any place in Saginaw or down town in Bay City where they could have unloaded and stored it, and for that reason unloaded it where they did.

Upon this statement of facts can it be said plaintiffs were entitled to recover the full contract price? It must not be forgotten that when the stone was ordered defendant had never seen it. It was not until it reached him that he refused to take it for the reason stated in his letter. Plaintiffs now claim and claimed upon the trial that the stone was of good quality. If when they received the letter they had informed defendant that they had filled his order and refused to have anything to do with the stone and should look to him for the contract price, a very different question would be presented from the one now before us. They did not do this, but took the stone back into their possession; made no effort to sell it, and at the time of the trial still had it in their

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possession. The plaintiffs themselves did not treat the transaction as a completed contract and the court cannot do so.

Judgment should be affirmed.

BLAIR, J., concurred with MOORE, J.

CARPENTER, J. The facts in this case are sufficiently stated in the opinion of Justice MOORE. The determining question is whether plaintiffs are at liberty to treat the transaction as a sale of the ten cars of crushed stone. When this crushed stone, which conformed to the contract of sale, was turned over to defendant, the title passed. Indeed, I am not sure that it did not pass when it was delivered to the railway company for carriage. See *Kuppenheimer* v. *Wertheimer*, 107 Mich. 77; *Althouse* v. *McMillan*, 132 Mich. 145. The circumstance that the defendant had an implied right to reject the same because it did not conform to the contract does not affect the principle. If it did conform to the contract—and the testimony shows that it did in this case—the title passed. This is settled by the above authorities.

It is contended, however, that plaintiffs cannot treat the transaction as a completed contract, because they took the stone back into their possession and made no effort to sell it. To this contention I cannot agree. Mr. Mechem, in his work on Sales (section 1618), quotes with approval from *Dustan* v. *McAndrew*, 44 N. Y. 72, as follows:

"The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own and recover the difference between the market price at the time and place of delivery, and the contract price."

The plaintiffs in this case chose the first of said reme-

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dies. They had a right to choose it and therefore it was error for the trial court to instruct a verdict against them.

If, when the case is tried, plaintiffs continue to hold this property for defendant, they will be entitled to recover the contract price and the necessary expense of removing the same from defendant's custody.

It follows that, in my opinion, the judgment should be reversed, and a new trial ordered.

McALVAY, C. J., and GRANT, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred with CARPENTER, J.

MERRILL v. LEISENRING.

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1. HUSBAND AND WIFE — ALIENATION OF AFFECTIONS — ISSUES — EVIDENCE ADMISSIBLE.
   In an action by a husband for alienation of his wife's affections by means other than adultery, evidence of facts and circumstances tending to prove adultery is not admissible to show the relations of the parties.

149 423
s157 133

2. SAME — LETTERS — ADMISSIBILITY.
   Letters written by plaintiff's wife before the alleged alienation of her affections are admissible for the purpose of showing that on account of plaintiff's conduct she had already ceased to care for him.

Error to Van Buren; Des Voignes, J. Submitted February 21, 1907. (Docket No. 131.) Decided September 20, 1907.

Case by James A. Merrill against David C. Leisenring for alienating the affections of plaintiff's wife. There was judgment for plaintiff, and defendant brings error. Reversed.

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W. W. Holmes, *James E. Chandler*, and *Harry C. Howard*, for appellant.

H. T. Cook and *Thomas J. Cavanaugh*, for appellee.

MCALVAY, C. J. Plaintiff sued defendant for alienation of the affections of his wife and recovered judgment for $4,500. The declaration in the case was in two counts. The first count charged adultery. The second count charged alienation of affections by means other than adultery. Upon the trial of the case, plaintiff abandoned the count charging adultery and announced that he would rely only upon the second count.

Defendant was the owner of a fruit farm near South Haven, and plaintiff with his family was a tenant of defendant. He was hired November 1, 1901, to work this place for one year with the understanding that after the first year he was to continue for two years more, provided they agreed, and either was to have the privilege on notice in case of disagreement to terminate the relation. Defendant had other land where he raised fruit and was engaged in some other business. He maintained a telephone in the house where plaintiff lived, and during the time plaintiff was employed there frequently took meals with his family, paying his wife for them. The theory upon which plaintiff's case was tried was that defendant became very friendly and intimate with his wife and frequently went to the house in plaintiff's absence, thereby alienating her affections; that he met her in South Haven and used to take her there in his buggy; that she would go there often to meet him; that these attentions continued after plaintiff moved to South Haven; that his wife separated from him in October, 1904.

The defense was a complete denial of the claims of plaintiff; that plaintiff had always disagreed with his wife; had accused her several years before with criminal intimacy with his cousin, a young man, and that her affections had been alienated from him on account of his own conduct. The case is here upon writ of error.

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It is claimed that the court erred in allowing the plaintiff to testify in the case, by reason of the prohibition of the statute (section 10213, 3 Comp. Laws). Defendant insists that the election to proceed upon the second count was a subterfuge for the purpose of procuring the testimony of the plaintiff in the case; that certain testimony he gave in the case tended to show adultery between defendant and plaintiff's wife, and that it was so intended. Plaintiff testified to some length as to preliminary matters and as to defendant's attentions to his wife, and proceeded to state that on March 30, 1903, he went to the house and found defendant in the closet off from the spare bedroom; that he pulled him out. He testified:

"We did not say very much. I was going to have him pulled (arrested). I told him he would pay for this dear sometime. * * * It was the closet off the spare bedroom, and when I went in my wife was in that bedroom."

Counsel for defendant moved to strike out this testimony for the reason that its whole tendency was to show carnal knowledge, and that plaintiff could not testify as to that against his wife. Plaintiff's attorney stated:

"We do not offer it for that purpose, but simply to show the relationship of the parties."

The motion was denied and defendant excepted. It cannot be disputed but that the tendency of this testimony was to show adultery between these parties. Coming from a witness other than the husband it would have been admissible in this case under the first count as tending to show adultery. If the case had been tried upon that count the husband could not have testified at all. The proposition is that in a case where alienation of affections is claimed by means other than adultery, the husband, because no adultery is charged, may testify to matters directly tending to show adultery, under an offer that the object of the proof is simply to show the relations of these parties, for the reason that adultery is not the only inference which can be legitimately drawn from this testimony.

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While it is true that this court has held that testimony cannot be excluded which is admissible to show a certain fact in a case, because it may have a tendency to show other facts for which it would not be admissible, yet this court has not said, nor are we cited to any authority which holds, that this rule would be recognized where the witness is prohibited from testifying at all as to facts which such testimony may tend to prove. If a husband may testify at all as to facts which tend to show adultery on the part of his wife, where will the line be drawn to limit such testimony? It must logically follow that he may testify to any and all facts except actual intercourse between the parties. Such a result is contrary to the spirit of every decision of this court sustaining the provisions of the statute invoked. This court has frequently approved this statute on the ground of public policy and as a protection to the marital relation. The settled law of this State is that neither husband nor wife may testify against the other in any case instituted by either in consequence of adultery. Plaintiff urges that this is not a case instituted in consequence of adultery. In form, as the case was tried, this may be true, but in fact the testimony of plaintiff tended to show the adultery of his wife. The first count of the declaration in this case was evidently abandoned for the sole purpose of qualifying the plaintiff as a witness. Whatever the form of the action may be, under the statute a husband or wife is prohibited from testifying to facts tending to show adultery on the part of the other, for the reason that the introduction of such proof of itself shows that the case is instituted in consequence of adultery. Upon no other ground could the testimony be material. All the evidence in the plaintiff's case—his own testimony, the testimony that defendant and his wife were together under the trees in the night, and that defendant went into the wife's stateroom on the steamer, where after a time he was seen dressing himself—tended to prove adultery on the part of the wife. To the ordinary mind, but one conclusion can be drawn, and that

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is, the case was instituted in consequence of adultery. The case is clearly within the statute, and plaintiff was not competent to testify as a witness.

As soon as it developed that plaintiff was testifying as to matters tending to show adultery on the part of his wife, defendant promptly objected. His counsel insist that the objection was based upon the statute and was broad enough to cover all of his testimony. Whether it was or not, is not necessary to decide. From this record it appears that he was not a competent witness. As the case must be reversed for the reason already given, attention is called to the question as affecting a new trial. *Carter* v. *Hill*, 81 Mich. 275.

Error is assigned upon the refusal of the court to allow the mother of plaintiff's wife to testify as to the contents of certain letters written to her by plaintiff's wife before the alleged alienation of her affections by defendant, for the purpose of showing that on account of plaintiff's conduct she had already ceased to care for him. These letters were material, but sufficient showing had not been made to allow parol evidence of their contents. The testimony was properly excluded.

Under objection and exceptions by defendant, plaintiff was allowed to introduce proof of facts occurring upon a passenger boat plying between South Haven and Chicago, a year after this suit was brought. It was admitted for the purpose of showing intent on the part of defendant, and the jury were cautioned that it should be considered for no other purpose. The objection was that it was not admissible under the pleadings, and was too remote from the time of commencement of suit. The material part of this testimony tended to prove that defendant, at an early hour in the morning, entered this woman's stateroom and remained there alone with her for a long time; that one of the witnesses looked through the window from the outside and saw them in there; that she was putting on her hat and he was dressing himself. Under the pleading, proof of adultery was not admissible,

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because none was charged. *Perry* v. *Lovejoy*, 49 Mich. 529, and cases cited. The reasonable, and practically the only, inference to be drawn from this testimony, is that it tended to show adultery. The court erred in admitting it.

It is not necessary to consider other assignments of error discussed, as the questions are not likely to arise upon another trial.

For the errors pointed out the judgment is reversed, and a new trial ordered.

MOORE, J., concurred with MCALVAY, C. J.

CARPENTER, J. I agree with the Chief Justice that the testimony of plaintiff tending to prove the adultery of his wife was inadmissible. I differ with him, however, as to the ground upon which we should place our decision. I think we should place it upon the ground that such testimony does not tend to establish the cause of action—alienation of affections by other means than adultery—set forth in the declaration. In short, under the pleadings, such testimony is inadmissible. This is settled by *Perry* v. *Lovejoy*, 49 Mich. 529. Placing our decision upon this ground makes it unnecessary to determine whether the testimony was prohibited by that part of section 10213, 3 Comp. Laws, which reads:

"In any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify."

Upon that question, therefore, I express no opinion.

Except as above indicated, I approve the opinion of the Chief Justice.

OSTRANDER and HOOKER, JJ., concurred with CARPENTER, J.

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BROWN v. EVANS.

1. HUSBAND AND WIFE — CRIMINAL CONVERSATION — ADULTERY — EVIDENCE — SUFFICIENCY.

   In an action for criminal conversation, an instruction respecting adultery that: "Mere opportunity to commit adultery is not sufficient to establish this offense; there must be evidence of such facts and circumstances, times and places, and association together as would naturally lead a man of ordinary care and prudence to the conclusion that such parties were having illicit sexual intercourse. It is not necessary to prove sexual intercourse by direct evidence; proof that the parties occupied the same bed during a portion of one night would be sufficient"—correctly states the law.

2. CONSPIRACY — EVIDENCE — SUFFICIENCY.

   An instruction that: "A common design or purpose by two or more persons is the essence of the charge of conspiracy, and this common design must be proved either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy you of the existence of such common design, before you can find a conspiracy"—is a correct statement of the law.

3. EVIDENCE — LETTERS — COPIES — ADMISSIBILITY — PRESUMPTION ON ERROR.

   Where a letter was traced to the possession of defendant's wife, who has since deceased, and defendant was given notice to produce it and denied having it, and plaintiff claims in this court that defendant was her administrator and as such the proper custodian of her papers, which defendant denies, claiming his son was administrator, and neither party points out any testimony in the record to sustain his claim, it will be presumed the trial court was correct in excluding a copy.

4. HUSBAND AND WIFE — CRIMINAL CONVERSATION — EVIDENCE — HEARSAY.

   In an action for alienation of affections and criminal conversation, testimony by witnesses as to statements made by plaintiff's wife to them, detailing acts of extremely cruel conduct on the part of her husband, is inadmissible, being purely hearsay.

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5. SAME—DOCUMENTARY EVIDENCE—SUBMISSION TO JURY.

Where suit was begun by capias based on affidavits, one of which stated facts conclusively showing adultery between defendant and plaintiff's wife, and defendant claims that affiant was one of several conspirators who were attempting to blackmail him, and offers a statement purporting to be signed by affiant just before he died, in which he retracted the statements made in the affidavit, plaintiff's request that the statement be submitted to the jury along with the affidavit for comparison of signatures, plaintiff claiming that the statement was a forgery, should be granted.

6. TRIAL—ARGUMENT OF COUNSEL—PREJUDICE—BOTH COUNSEL AT FAULT.

Improper conduct and argument of counsel cannot be complained of by counsel equally at fault, the court having rebuked both during the trial and instructed the jury not to consider the prejudicial statements.

Error to Allegan; Padgham, J. Submitted June 6, 1907. (Docket No. 40.) Decided September 20, 1907.

Case by Harry Brown against Isaac E. Evans for the alienation of the affections of plaintiff's wife, and for criminal conversation. There was judgment for defendant, and plaintiff brings error. Reversed.

Plaintiff in his declaration charged defendant with the alienation of his wife's affections and criminal conversation with her. Defendant denied the accusation, and charged that the plaintiff and certain other persons had entered into a conspiracy against him for the purposes of blackmail. The testimony is in very sharp conflict. The jury evidently found it necessary to determine what witnesses had testified falsely. If the jury believed some of the testimony on the part of the plaintiff they would have found the defendant guilty of adultery with plaintiff's wife, and that he had alienated her affections. Evidently they did not believe it, but did find that defendant was guilty of no improper relations with her, and that a conspiracy to blackmail defendant had been established, or else they believed that plaintiff by his own cruel and bru-

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tal conduct towards his wife had alienated all the affections she ever had for him before there was any intimacy between her and defendant. There was evidence to support either finding. The errors assigned relate to the rulings of the court upon the testimony; to the misconduct of defendant's counsel; to prejudicial remarks by the court, and the instructions to the jury.

Clare E. Hoffman (*Fidus E. Fish* and *W. J. Barnard*, of counsel), for appellant.

Thew & Thompson (*Wilkes & Stone*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). 1. The learned circuit judge fully and fairly stated to the jury the claims of the respective parties. He then fully and correctly instructed them upon all the questions of law involved. Upon the question of adultery he instructed the jury in part as follows:

"Mere opportunity to commit adultery is not sufficient to establish this offense; there must be evidence of such facts and circumstances, times and places, and association together as would naturally lead a man of ordinary care and prudence to the conclusion that such parties were having illicit sexual intercourse. * * *

"It is not necessary to prove by direct evidence that the defendant had sexual intercourse with Mrs. Brown. If you find from the evidence that Mrs. Brown and the defendant occupied the same bed during the portion of one night, this is sufficient proof—that a man and woman not husband and wife occupied the same bed, would be sufficient to find adultery."

Upon the question of conspiracy he instructed the jury in part as follows:

"A common design or purpose by two or more persons is the essence of the charge of conspiracy, and this common design must be proved either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy you of the existence

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of such common design, before you can find a conspiracy."

No question is raised as to the correctness of the instructions upon the alienation of the wife's affections. The above excerpts are a correct statement of the law, and the other parts of the charge were in accordance with them. The correctness of a charge cannot be determined by isolated sentences. Taken as a whole, the charge in this case contains no error.

2. Error is assigned upon the refusal of the court to admit in evidence a copy of a letter claimed by plaintiff to have been written by defendant to his (plaintiff's) wife. This letter is important, for if it was written by defendant it tended very strongly to show illicit relations between defendant and plaintiff's wife. Plaintiff gave evidence tending to show that this letter came into the possession of Mrs. Evans, who had died before the trial. Notice had been given to defendant to produce this letter. He denied having such a letter. The theory of the plaintiff was that defendant was the administrator of his wife's estate, and as such was the custodian of her papers. Counsel for plaintiff assert in their brief that he was the administrator. Counsel for defendant assert in their brief that he was not, but that her son was the administrator. Neither counsel point to any testimony in the record to sustain their assertions. We must therefore assume that the court correctly excluded the copy.

3. Several witnesses for the defendant were permitted to testify to the statements made by plaintiff's wife to them, detailing acts of extremely cruel conduct on the part of her husband. It needs no argument to show that this was error. The testimony was purely hearsay.

4. This suit was commenced by capias. One of the affidavits filed in the case as a basis for the writ was made by one Albert Jackson, alleged by the defendant to be one of the conspirators, stating facts which would conclusively show adultery on the part of defendant and Mrs. Brown. Jackson died before the suit was tried. It

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was claimed that he signed a statement just before he died retracting the charges made in his affidavit This was introduced in evidence. Plaintiff claimed that the statement was a forgery, and asked to submit to the jury the signature of Jackson to the affidavit so that they might compare the two signatures. This was refused. The affidavit was a part of the files in the case. No collateral issue could be raised as to its genuineness. The request should have been granted. *Vinton* v. *Peck*, 14 Mich. 292; *People* v. *Hutchings*, 137 Mich. 527.

5. While it is true that counsel for defendant made statements during the trial not justified by the record and undoubtedly intended to prejudice the jury, the court promptly rebuked them, and in his charge instructed the jury not to consider them. It is equally true that plaintiff's counsel were not free from the same fault. The conduct of counsel was such that it drew from the court, during the progress of the trial, the following rebuke:

"I want it understood now, from here on, we are going to try this case according to the rules of law; if we don't the case is going out of court. Now just let us understand it. I have made up my mind that we have fooled long enough, and you want to try it according to the rules of law on both sides without lugging in matters that are incompetent and immaterial."

Some 30 other errors are assigned upon the rulings of the court during the trial. The most of them are without merit, and as the others need not arise on a new trial, it is unnecessary to determine them.

Judgment reversed, and new trial ordered.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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CUSICK *v.* SPENCER.

1. MORTGAGES—FORECLOSURE—RIGHT TO REDEEM.
   Where the president of a bank, which had foreclosed a mortgage on complainant's property for more than the amount legally due, agreed that if complainant would remit $100 to him before the period of redemption expired he would redeem the property for the amount legally due and sell it to complainant on contract, and complainant sent the $100 as agreed, which the president used with his own funds in purchasing the property, he could not, by refusing to furnish complainant information as to how much was actually due upon the mortgage, defeat her of her right to redeem, nor by paying more than was legally due the bank compel her to pay him a like sum.

2. SAME—AMOUNT DUE—KNOWLEDGE OF AGENT.
   A claim that complainant's husband, who attended to the business for her, knew the facts as well as the president of the bank, and that therefore complainant was bound to pay him the amount he paid the bank, is not well taken where, though complainant's husband knew that payments had been made upon the mortgage and the amount of them, he was not apprised of the computation and just what made up the total amount for which the place was sold.

3. SAME—RECOGNITION OF COMPLAINANT'S TITLE.
   Recognition by defendant president of complainant's ownership of the property, and his advising with her about repairs, is a circumstance supporting her right to redeem.

4. SAME—ATTEMPTED RESCISSION BY COMPLAINANT—EFFECT.
   An unsuccessful demand of the $100 after failure to agree as to the amount legally due upon the mortgage does not operate to defeat complainant of her right to redeem.

5. SAME—LACHES—DEFENSE—AVAILABILITY.
   A delay of seven years is not such laches as will defeat complainant's right to redeem, where neither of the defendants treated complainant frankly and openly, but withheld from her the true facts in regard to the payments made upon her mortgage, and, knowing of complainant's claims, acted in open hostility and defiance thereof and have been in no respect misled.

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Appeal from Ionia; Lockwood, J., presiding. Submitted June 6, 1907. (Docket No. 31.) Decided September 20, 1907.

Bill by Esther L. Cusick against Edwin R. Spencer and the People's Savings Bank of Belding to declare a conveyance absolute in form to be a mortgage, and for an accounting. From a decree for complainant, defendant Spencer appeals. Modified and affirmed.

R. A. & W. E. Hawley, for complainant.

Morse & Locke, for appellant.

MONTGOMERY, J. This bill is filed for the purpose of having a deed made by defendant bank to defendant Edwin R. Spencer declared a mortgage and for an accounting as to the amount due Spencer, and for the privilege of redeeming.

The complainant, prior to 1894, was the owner of the premises in question, consisting of the south half of lots 158 and 159 of the city of Belding. There were two mortgages upon the property, the first amounting to about $300, subject to which the mortgage in question in this case was given. This last-named mortgage was, on the 20th of October, 1894, assigned to defendant Spencer. At that date there was due upon said mortgage the sum of $575. Complainant, through her husband, who acted as her agent in all the transactions involved in this case, agreed with Spencer to turn the rent of the house over to him to apply on the mortgage, and authorized Spencer to collect it. Spencer did collect the rent and, after paying taxes and some expenses, had in his hands $57.66 to apply on the mortgage, and turned over to the bank the $57.66 to be by it applied on the mortgage, and on May 3, 1895, assigned the mortgage to defendant bank. The bank notified complainant that foreclosure proceedings would be taken if payment were not made. On August 1st complainant sent a draft to defendant bank for $50,

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and defendant Spencer paid to the bank $10.15 which he had retained in his hands but which should have been indorsed upon the mortgage. Complainant and her husband removed from Michigan to Wisconsin, and about this date defendant bank started foreclosure. The premises were bid in by the bank for the amount claimed to be due in the notice, together with interest and costs. No credit was given on the mortgage for the $57.66 rent, the $50 draft, and the $10.15 paid by Spencer, and the amount claimed to be due was excessive by the amount of $117.81.

In November, 1896, the defendant Spencer was approached in behalf of complainant with the request that some arrangement be made by which complainant might save her property. It should be stated that Spencer was the president of the defendant bank. On the 25th of November defendant wrote Mr. Cusick, complainant's husband, as follows:

"The time in which you can redeem the property expires some time next month. Mr. Post informs me that you would like to make one more effort to save the property. We have a chance to sell it as soon as we get possession so as to make a pretty good thing off of it, I think, but if there is anything to be made or saved out of it, it seems to me as if you ought to be the one to have the benefit.

"Now, I will make you this proposition if accepted before the redemption runs out: I will take up the first mortgage and collect the rents and send you receipts twice a year to apply on contract for sale from me to you. I will accept $100 as first payment and $15 per month thereafter. This you see will reduce the amount to where it would be safe for any one to carry in a short time."

On the first of December Mr. Cusick wrote Spencer asking for some information in regard to foreclosure. This was evidently before the receipt of Spencer's letter of the 25th. On the 2d of December Cusick wrote in reply to the letter of the 25th:

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"Yours of the 25th was received this afternoon. Was not mailed until yesterday. I wrote you a letter, not hearing from you, and explained to you. Please answer that immediately and give me amount of interest, principal and costs, and in full what I am to pay. I do not understand what you mean by payment of $15 per month. Does it include the rent? I will make up the $15, but it may come quarterly as my daughter does not draw her pay every month, and so would have to pay two or three months at a time. Will that be satisfactory?"

On the 14th of December Spencer wrote Cusick as follows:

"The amount of the claim of the People's Savings Bank on your place here is $692.05, December 31st, 1896. I do not know just what the first claim is, perhaps you do. Now, if you will send me the $100, as you suggested, I will go and take up the first claim and give you a contract for a deed on the terms you made, $15 per month quarterly, you to have the rent applied on the amount. You may send the money to me or the bank and we will immediately receipt for the same. If you accept this proposition, let me know at once."

On the same day Cusick had written Spencer the following letter:

"I have written you three times but no reply as yet, and I am getting very anxious to hear from you, and to have the contract for that place. I thought that I made it plain to you what I could do, and am waiting in great suspense, as I do not know when the time of redemption runs out, and you did not say only some time this month."

On the 15th of December, Cusick wrote to Spencer as follows:

"Yours of the 14th is received, and contents noted, and in looking over your statement I cannot see how you make it $692.05. The principal was $500, and when I looked over one year ago last June there was somewheres about $25 interest due after paying that $10 house rent to Mr. Reed, and then I sent to Mr. Reed from Lowell, in draft, the last of July or the first of August, 1895, $50. You remember that I told you and Mr. Holmes that I would when you were in the bank, to keep the bank from fore-

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closing. And that would, as I had in my mind then and now, reduce it to about $485, and the interest from then till December 31, 1896. And the expense of foreclosing is what would be added to the amount due. I suppose it cost about $50 to foreclose, and I cannot see how you make it $692.05. You must be mistaken somewhere.

"I wish you would look this all over and give me the dates of payments made and interest and otherwise, and what it cost to foreclose, and then I can see how it is. I only ask to have it all clear and satisfactory. But you can see by the way I state it, there is quite a wide difference, and if you can give me the figures and the dates of payments made on note, and the cost of foreclosure, it will show for itself."

And on the 19th of December Cusick wrote Spencer, enclosing him $100, and requested him to send statement of amount and indorsements made on note by payments and interest, cost of foreclosure, etc., and asked that the contract be made in the name of Eunice E. Cusick, complainant's daughter, from whom complainant had made an arrangement to borrow the money to make the initial payment to Spencer.

On the 21st of December, 1896, Spencer again wrote as follows:

"In answer to yours of recent date I will say that I will take up all claims against the property, hold the deed in my own name and contract to deed to you free and clear when you shall pay me the amount actually paid by me with interest until paid at 7 per cent. The amount is as stated and I enclose you statement of bill of expense. You have or should know what the other claim is, as soon as I pay it will send you the amount if we deal.

"You can make a contract as well as I, as I am a very busy man and my time is all employed. The amount against the property has got to be paid by some one with accrued interest until paid. You can make the contract as we have proposed, one hundred dollars down and fifteen dollars a month until all legal claims against the property is fully paid with interest on all amounts unpaid at the rate of 7 per cent. per annum to be paid at the end of the year or you can so arrange as to pay the interest with each monthly payment. I see nothing which you

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cannot fully understand excepting the exact amount to be paid, and I do not see how that can be determined until all the legal claims are paid. This will be the amount due the bank with interest till I sign the contract with you. The amount due on the first claim and the taxes now due. I know how you feel about this matter to see so much money as you have put into the place go, but cannot go to much further time and expense in trying to help you save it, so if you wish to deal make such a contract as I have suggested and send with draft with $100 to one of the banks or some one here. Make the amount to be paid all legal claims against the property up to the date of the contract."

This was in answer to the letter of the 19th from Cusick requesting a statement of the amount and indorsements made on the note by payments and interest, cost of foreclosure, etc.

On the 24th Cusick wrote in reply the following letter:

"Your statement of cost of sale is all clear, but I do not see where I have been credited with the amount that I have paid on interest to Rev. Shelly, and the rent paid to you, and the $50 sent to the bank.

"The amount of mortgage was $500, and I paid to the Rev. Shelly $45 or $50 on interest, and you had rent on house that amounted in all, I think, to about $66, and I sent to the bank $50 from Lowell to apply on mortgage; and, if you have given me credit for all of this, which, of course, you can see that I have paid, I do not make it as you do. If I am credited with what I have paid, that is all I ask. And, if you figure up the interest on the note and mortgage for four years (I think the mortgage was drawn in October, 1891), and the first was paid in full and then what cost has been, etc., and give me credit as I paid, is all that can be asked. And if you had sent me the statement separate of interest accrued, and the amount I paid, I could see where we disagree.

"You take the amounts that I have paid in and see what it amounts to, and then the amount of interest that accrued, and I think you will find up to the time of the foreclosure I was up with my interest on your mortgage of $500, and send me that statement, with the one on first mortgage, and you make out contract as you state, and collect the rent, and apply on payments, and it will be all right."

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On the 7th of January Spencer wrote Miss Cusick that he had been waiting to get the amount of the first mortgage, and that he would, as soon as he learned that, send her the contract. On the 30th of January the contract was sent forward to Miss Cusick. On the 27th of February Cusick again wrote to Spencer asking for information in particular as to the amounts due upon the mortgage. Again on the 8th of March Spencer replied, giving the amount of costs only, but made no attempt to go into detail as to the amount of payments. On the 25th of January the land had been conveyed by the defendant bank to Spencer for the expressed consideration of $1,150, and Spencer was insisting that he had paid out in the transactions $1,149.52. Miss Cusick refused to sign the contract, evidently because of inability to agree as to the amount properly chargeable against the property, and finally demanded back the $100 which she had paid, which was, however, not refunded to her.

Complainant then employed Mr. Fallass, an attorney at Grand Rapids. He also demanded the repayment of the money and undertook to get some satisfaction out of the bank but succeeded in neither, and the matter ran along until 1904, when Mr. Cusick again came to Belding and tried to get a settlement, and failing in that this bill was filed, when for the first time, on the trial, it was conceded that the complainant's property had been charged with a greater sum in the foreclosure proceedings than was due to the bank, but it was insisted, *first*, that the agreement between complainant and Spencer was that he should pay the bank its claim and that therefore he was not in fault in paying the full amount for which the property was sold, and, *secondly*, that, inasmuch as the parties refused to sign the contract, no binding contract existed between complainant and defendant giving any right to the complainant to redeem from the sale.

When the relations of the defendant Spencer to the bank are considered, and the correspondence construed in connection with it, we are fully satisfied that the parties

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contemplated and agreed that Spencer should redeem the property for complainant by paying all legal claims and none other. This agreement was made before the time for redemption from the foreclosure sale had expired. Complainant had remitted $100 in cash to be applied upon this contract, and the only reason that the written contract was not signed between the parties was that defendant Spencer ignored the requests of complainant's husband for a statement of the details of the transaction, with which he in part, at least, was familiar, and all of which appeared upon the books of the bank of which he was president, and to which books he is shown to have had access. His agreement was to advance the moneys to pay these claims against the property, and for this purpose a portion of the money, to wit, $100, was put in his hands and used by him for that purpose. This was money advanced by complainant, and to permit defendant to assert that by using this money with his own to take title over to this property, and then refusing to furnish the information upon which a written contract could be based, he has succeeded in defeating complainant of all her equities, is to permit him to take advantage of his own wrong or neglect. It is not necessary to assert that this information was fraudulently withheld by Spencer. It is obvious that it was arbitrarily withheld by the cashier of the bank, and defendant Spencer as well. He owed a duty to furnish this information to complainant and he ought not to be permitted to profit by his failure to do so.

It is claimed that complainant's husband knew the facts as well as Spencer. This is not exactly true. He did know that payments had been made and about the amount of them; but of the computation and just what made up the total amount he was not apprised, as he had the right to be. Furthermore, defendant Spencer recognized complainant's ownership of the property. He for a time sought to advise with her, and stated that with relation to repairs he would be governed largely by her wishes. We are satisfied that under these circumstances the complain-

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ant had a right to redeem upon payment of the amount of the mortgage. *Sowles* v. *Wilcox*, 127 Mich. 166.

It is insisted that complainant has lost her right to redeem because complainant's daughter, Eunice, endeavored to get back the money she had furnished, and because complainant acting through her counsel demanded repayment of the $100 paid to Spencer. Neither the bank or Spencer parted with any money. They were not deceived or misled by these demands. Their legal relations were not changed in any way, there is no element of estoppel, nothing more than an unsuccessful attempt to adjust a difference.

It is also urged that the complainant has been guilty of such laches as should defeat her remedy. Assuming that this defense is open upon the pleadings, we think the complainant has been guilty of no such laches as should defeat her remedy. Neither of the defendants treated complainant frankly and openly. They withheld from her the true facts in regard to the payments, and while complainant's husband may have known that she had not been credited with all of her payments he was not aware of the facility by which proof could be made by reference to defendant's books. Moreover, defendants, knowing the claims of complainant, acted in open hostility and in defiance to her rights and have been in no respect misled. It was known by defendants from the first that there was no acquiescence in the position taken by defendants, and as the delay has worked no injury to the defendants which cannot be redressed, we think this defense also should fail.

It seems that the defendant has built a house upon the adjoining property so that a few feet of it rest upon the property in question. By the decree below he was permitted to remove this. He was also permitted to recover the amount expended for repairs and improvements made to the house and premises, so far as were necessary and reasonable. We think it may be assumed that such repairs as were made in good faith were necessary, and

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defendant should be allowed a reasonable expenditure for them.

With this modification, the decree of the court below should be affirmed, with costs of both courts to complainant.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

STARKWEATHER v. CHATFIELD.

149 443
153 432
j153 433
j153 437

DRAINS—ESTABLISHMENT — PETITION — SIGNERS — FREEHOLDERS — PURCHASERS ON CONTRACT.

Since by the common law and by the statute (section 8787, 3 Comp. Laws) estates of inheritance are freehold estates, and the estate of the vendee in a land contract in possession is an estate of inheritance, such a vendee is a freeholder, and as such entitled to sign an application for a drain under section 4319, 2 Comp. Laws.

Appeal from Lenawee; Chester, J. Submitted June 7, 1907. (Docket No. 52.) Decided September 20, 1907.

Bill by Ira Starkweather and others against Willis Chatfield, drain commissioner of Lenawee county, to restrain the construction of a drain. From a decree dismissing the bill, complainants appeal. Affirmed.

B. L. Hart and *Bird & Sampson*, for complainants.

Theodore M. Joslin, for defendant.

OSTRANDER, J. Eleven persons signed the application

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for the drain (2 Comp. Laws, § 4319), ten of them being freeholders if the vendee in a land contract, in possession, is a freeholder. At the common law (1 Bouvier's Dictionary, p. 693, tit., Estate of Freehold) and by statute (3 Comp. Laws, § 8787) estates of inheritance are freehold estates. The estate of the vendee in a land contract, in possession, is an estate of inheritance. *Wing* v. *McDowell*, Walk. Ch. (Mich.) 175; *House* v. *Dexter*, 9 Mich. 246; *Fitzhugh* v. *Maxwell*, 34 Mich. 138; *Bowen* v. *Lansing*, 129 Mich. 117 (57 L. R. A. 643). See, also, *City of Marquette* v. *Land Co.*, 132 Mich. 130.

The decree is affirmed, with costs to defendant.

CARPENTER, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

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HILLIKER *v.* FARR.

1. INTOXICATING LIQUORS—CIVIL DAMAGE LAW—LIABILITY OF FURNISHER.

   In an action under the civil damage law (section 5398, 2 Comp. Laws), against a saloon keeper and his bondsmen, the question whether the saloon keeper received pay for liquor shown to have been furnished in his saloon is immaterial.

2. SAME—SALE OF SALOON—LIABILITY OF SELLER'S BONDSMEN.

   Where a saloon keeper sold his saloon and gave the buyer a power of attorney authorizing him to conduct the saloon business as the seller's agent, such authority being a mere pretense to enable the buyer to carry on the business unlawfully under the seller's license, the seller's bondsmen are not liable under the civil damage act for unlawful sales made by the buyer.

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3. SAME—COLORABLE SALE.
Where a person making an unlawful sale of liquor in a saloon was a bona fide agent of the owner of the saloon, and a sale of the business to the agent was a mere pretense to relieve the owner's bondsmen from responsibility, such bondsmen are none the less liable.

4. SAME—EVIDENCE—CHARACTER OF TRANSACTION.
In an action against a saloon keeper and his bondsmen for an unlawful sale made by one to whom it is claimed the saloon was sold and a power of attorney given to facilitate conducting the business under the seller's license, evidence tending to show that the transaction was a bona fide sale and not the creation of an agency is admissible, though it tends to contradict the power of attorney.

5. WITNESSES—SELF CRIMINATION—EFFECT.
Where, in an action against a saloon keeper and his bondsmen for an unlawful sale made by one to whom it is claimed the saloon was sold and a power of attorney given as a mere sham to facilitate conducting the business under the seller's license, the court ordered the alleged buyer to produce the power of attorney, a claim that he was thereby compelled to incriminate himself is untenable, as the only bearing the power of attorney would have in case he were informed against for running a saloon without a license would be to furnish evidence of his innocence.

6. INTOXICATING LIQUORS—CIVIL DAMAGE LAW—ACTION—EVIDENCE—OTHER UNLAWFUL SALES.
In an action against a saloon keeper and his bondsmen under the civil damage law for an unlawful sale of liquors, it is error to allow proof by plaintiff of other unlawful sales to other persons on the day in question.

7. SAME—ARGUMENT OF COUNSEL—PREJUDICE.
A remark by counsel in argument that "he had been in the practice of law for a good many years and this is the first case he ever knew where counsel for liquor dealers ask the jury to go by the evidence," is improper and prejudicial.

8. SAME—DAMAGES—EVIDENCE.
A mother suing under the civil damage law for the death of her son is not entitled to show that her husband paid the doctor's bills and funeral expenses of decedent occasioned by his injury.

Error to Osceola; Rose, J. Submitted June 10, 1907. (Docket No. 62.) Decided September 20, 1907.

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Case by Marie Hilliker against Ray A. Farr, principal, and Reuben B. Farr and Olof Ingstrom, sureties, and James E. Denoyer, principal, and Clause Freese and Albert Miller, sureties, and Fred Noack, under the civil damage act. There was judgment for plaintiff against defendants Freese, Miller, and Noack, and they bring error. Reversed.

Stephen H. Clink and *B. Newton Savidge*, for appellants.

Charles A. Withey, for appellee.

CARPENTER, J. Harland Hilliker, plaintiff's son, died from injuries received in a drunken brawl. Plaintiff, who was being supported by wages earned by her son, brings this suit to recover damages, claiming that his death resulted from liquor furnished him by defendant Noack, who kept a saloon in Dighton, Osceola county, and Ray A. Farr, who kept a saloon in Tustin, Osceola county. She contends that Noack was operating the saloon as the agent of defendant James E. Denoyer, and she, therefore, joined as defendants said Denoyer and the sureties on his bonds, defendants Freese and Miller. She also joined as defendants Reuben B. Farr and Olof Ingstrom, who were the sureties on the bond of defendant Farr. Denoyer was absent from the State; was not served with process and did not appear, and, therefore, is not concerned in the result of this suit. A verdict and judgment were rendered in favor of Farr and his sureties and against Noack and the sureties on the bond of Denoyer. These last-named defendants appeal to this court and ask a reversal of the judgment for several reasons:

First. Witnesses for plaintiff testified that Noack carried in an adjoining pool room, where Hilliker and his companions were playing pool, a tray of liquor, and that Hilliker drank a portion of this liquor. It is now contended that Noack is not responsible for the consequences, because the testimony does not show that he received pay for said

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liquor. We think the jury might have drawn the inference that Noack furnished the liquor under a promise or expectation of being paid therefor, and even though he did not, he would be liable. The statute creating the plaintiff's right of action (section 5398, 2 Comp. Laws) reads:

"Every * * * parent * * * who shall be injured in * * * means of support * * * by reason of the selling, giving or furnishing any spirituous, intoxicating, fermented or malt liquors, to any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury."

People v. *Bird*, 138 Mich. 31 (67 L. R. A. 424), relied upon by defendant's counsel, has obviously no application. That was a criminal case based upon facts very different from those in the case at bar, and it involved the construction of an entirely different section of the statute.

Second. Defendant Noack was made a witness by the plaintiff. He testified that he bought the saloon and its contents from Denoyer, the former proprietor; that he received from Denoyer a power of attorney authorizing him to conduct the saloon business as Denoyer's agent; that he used the red card (the tax receipt) of Denoyer and purchased goods in Denoyer's name. There was no evidence tending to show that the sureties on Denoyer's bond had any knowledge of the transaction between their principal and Noack. Appellants contend that this testimony did not warrant the trial court in submitting to the jury the question of the liability of Denoyer's sureties. Appellee contends that it justified the trial court in directing a verdict against said sureties. We differ from both of them. We deny each of the above contentions. From the above testimony the jury were warranted in reaching either of the two following opposed conclusions: *First*, that there was an actual sale by Denoyer to Noack, and that author-

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ity to act as his agent was a mere pretense to enable the latter to carry on his business unlawfully under the license of the former; or, *second*, that Noack was a bona fide agent of Denoyer and that no sale was made, or if made, it was a mere pretense to relieve Denoyer's sureties from responsibility. It is clear that if the jury reached the second conclusion, Denoyer's sureties were responsible. It is equally clear that if they reached the first conclusion, they were not responsible, and the verdict should have been in their favor. This is settled by *Mathews* v. *Garman*, 110 Mich. 559. It is true that *Mathews* v. *Garman* differs from the case at bar in this particular, viz., there the vendor did not authorize his vendee to carry on the business as his agent. Whoever insists that this difference is material must contend that a principal has unlimited power to extend the obligations of his sureties. He has no such power.

In his charge to the jury, the trial judge fully recognized these principles, but he disregarded them in certain rulings when testimony was being introduced. For instance, on the cross-examination of Noack, he declined to permit defendant's counsel to obtain answers to the following questions, viz.:

"Were you in fact a true agent of Mr. Denoyer after August 2d, 1904 (August 2d, 1904, was the date of the alleged sale)?

"What did you do with the proceeds of that saloon after the second day of August, 1904?"

These rulings were erroneous. It must be assumed that they prevented defendants from introducing testimony tending to prove that the transaction between Noack and Denoyer was a sale and not the creation of an agency. In reaching the above conclusion, we deny the proposition asserted by plaintiff's counsel, viz., that the proposed testimony was inadmissible because it tended to contradict the power of attorney heretofore mentioned. Denoyer's sureties clearly had a right to prove, if they could, that the power of attorney was a mere sham. In

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this connection we notice the claim of appellant that the court erred in not permitting one Cole to testify "to what was said by the parties" at the time he (Cole) loaned Noack $25 to pay Denoyer on this deal. We cannot say from the record that Denoyer was a party to this conversation. For the purpose of a new trial which must take place, we think it proper to say that if he was, the excluded testimony was admissible.

Third. It is contended that Noack was compelled to incriminate himself when by the order of the trial court he produced the power of attorney heretofore referred to. The ground upon which it is contended that this document incriminated Noack is stated in the brief of defendants' counsel as follows:

"Suppose Noack had been immediately thereafter complained of for running that saloon without a license. Would not this power of attorney have an important bearing upon the trial of that cause?"

We answer that in such a case its only bearing would be to furnish evidence of Noack's innocence. It would have no tendency whatever to prove his guilt. Indeed, he is guilty only upon the assumption that the power of attorney is a mere sham. We think there was no error in the ruling under consideration.

Fourth. Complaint is made because the trial court permitted plaintiff to prove that Noack made an unlawful sale of liquor to a third person on the same day that it is alleged he furnished liquor to Hilliker and his companions. We think this complaint is well founded. This testimony had no legitimate bearing on any issue involved in the case. Its only tendency was to create a predjudice in favor of plaintiff. It cannot be said that if this testimony had been excluded the jury would have rendered a verdict in plaintiff's favor. In this connection it is proper to notice a remark made by plaintiff's counsel in his argument to the jury, viz., he said that "he had been in the practice of law for a good many years and this is

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the first case he ever knew where counsel for liquor dealers ask the jury to go by the evidence." It is scarcely necessary to say that this remark was improper and prejudicial. It should not have been made.

Fifth. Plaintiff was allowed to prove that her husband paid the bills (the doctor bills and funeral expenses) occasioned by her son's injury and death. While it is doubtful if defendants were harmed by the admission of this testimony, it would have been proper to exclude it. It had no bearing on any issue in the case.

Other complaints are made. They have received our careful consideration. Some of them are determined by the reasoning of this opinion. Most of them are entirely lacking in merit. None of them raise important questions, nor questions likely to arise upon a new trial. They are, therefore, not discussed.

The judgment is reversed, and a new trial ordered.

MCALVAY, C. J., and GRANT, HOOKER, and MOORE, JJ. concurred.

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MOFFET v. SEBASTIAN.

1. BILLS AND NOTES—JOINT NOTE—ACTION AGAINST JOINT MAKER —VERDICT—HARMLESS ERROR.

   In an action by a maker of a joint note against his co-maker to recover his proportion of the amount paid thereon, plaintiff having made payments at different times, defendant is not injured by the trial court requiring the jury to state in their verdict the several sums allowed plaintiff and their dates and amounts.

2. PLEADING — BILLS OF PARTICULARS — PROOF — VARIANCE — EFFECT.

   Where, in an action by a joint maker of a note against his co-maker, the bill of particulars charges that the joint obligation was discharged by the payment of the entire amount due, recovery by plaintiff of advances consisting in part of money and in part of property made under a compromise agreement whereby the holder of the joint obligation accepted less than its face value, cannot be complained of by defendant, being favorable to him.

3. SAVING QUESTIONS FOR REVIEW—DENIAL OF NEW TRIAL—NECESSITY OF EXCEPTION.

   Error in denying a motion for a new trial cannot be reviewed in the absence of an exception to such denial.

4. APPEAL AND ERROR—NECESSITY OF ASSIGNMENTS.

   Errors unsupported by assignments of error cannot be reviewed.

Error to Berrien; Coolidge, J. Submitted June 11, 1907. (Docket No. 67.) Decided September 20, 1907.

Assumpsit by A. H. Moffet against John Sebastian for his proportion of a joint promissory note. There was judgment for plaintiff, and defendant brings error. Affirmed.

Humphrey S. Gray, for appellant.

Lawrence C. Fyfe and *Waters & Waters*, for appellee.

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CARPENTER, J. In 1887 the parties to this suit made a joint purchase of stock in a Kansas land company. They raised the money for this investment by giving a joint note for five thousand dollars. Plaintiff claims that he paid this note; and he brings this suit to recover the amount thereof justly chargeable to defendant. He obtained a verdict and judgment in the circuit court.

Defendant asks us to reverse that judgment for several reasons:

First. He contends that the trial court erred in requiring the jury to state in their verdict the several items allowed plaintiff; their dates and amounts. (Plaintiff discharged the notes by payments at different times.) If this was error, it was not reversible error; for it did not injure defendant.

Second. Included in the amount recovered were certain advances—consisting in part of money and in part of property—made under a compromise agreement whereby the holder of the joint obligation accepted less than its face value. The contention is now made that none of these advances could be recovered because they were not specified in plaintiff's bill of particulars. It is charged in the bill of particulars that the joint obligation was discharged by the payment of the entire amount due. It thus appears that the bill of particulars overstates the amount advanced by plaintiff for defendant and does not state that part of that amount was in property and not in money.

The complaint of defendant requires us to consider only one of these discrepancies, viz., the statement in the bill of particulars that plaintiff paid an amount larger than he actually did pay. This difference was favorable to defendant, and he cannot complain of the variance. *Collins* v. *Beecher*, 45 Mich. 436.

Third. It is contended that defendant did not authorize the making of the compromise agreement under which the advances just mentioned were made. It is sufficient to say that this was a question which the court properly

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submitted to the jury; for there was evidence tending to prove that defendant did authorize the making of said agreement.

Fourth. It is contended that the court erred in denying defendant's motion for a new trial. No exception was taken to this denial and we cannot consider it. *Pearl* v. *Township of Benton*, 136 Mich. 697.

Fifth. Other errors are alleged. Some of them are based on no assignment of error; some of them are based on an erroneous construction of the court's charge. None of them are meritorious.

Judgment affirmed.

McALVAY, C. J., and GRANT, HOOKER, and MOORE, JJ., concurred.

CUBA COLONY CO. *v.* KIRBY.

1. CORPORATIONS—PROMOTERS—ACQUISITION OF STOCK—FRAUD.
   Where the promoters of a corporation represented that they owned a contract to purchase certain land at the price of $60,000, on which they had paid $20,000, and proposed to transfer it to the corporation for $20,000 in stock, the corporation to pay the remaining $40,000 on the contract, which proposal was accepted, and the corporation organized with a capital of $60,000, $40,000 of which was paid for the land, and $20,000 in stock to the promoters, and the price of the land was in fact $40,000, on which the promoters had paid nothing, they were not entitled to retain their stock, and were accountable to the corporation for moneys received from the sale of such stock.

2. SAME—RELIANCE ON REPRESENTATIONS.
   That some of their associates doubted the truth of the promot-

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ers' statements is immaterial, where they were finally led by the promoters to resolve the doubt in their favor, and act upon the assumption that the false statements were true.

3. SAME—EQUITY—MAXIM—CLEAN HANDS—APPLICATION.
The maxim requiring a complainant in equity to come with clean hands is not applicable on the ground that after its acquisition of the land complainant corporation issued statements misrepresenting its value, since, with the promoters, who were chiefly responsible for the false statements, out of the corporation, it is not to be presumed that such statements will continue to be issued or that any further harm will come from those already issued.

4. SAME—PROMOTION EXPENSES—ALLOWANCE.
Promoters are not entitled to an allowance for promotion expenses where they represented to their associates that there was to be no such allowance.

5. SAME—CANCELLATION OF STOCK—BONA FIDE HOLDER.
Where stock in a corporation fraudulently obtained by a promoter has been transferred to a good faith holder as security for a debt, such holder has a right to retain it as such security subject to the right of the corporation to pay the debt and be subrogated to such holder's rights against the debtor.

Appeal from Calhoun; Hopkins, J. Submitted June 11, 1907. (Docket No. 79.) Decided September 20, 1907.

Bill by the Cuba Colony Company against Adolphus D. Kirby, Charles H. Howard, and Harriet E. Howard for the cancellation of certain shares of stock on the ground of fraud. From a decree for complainant, defendants appeal. Modified and affirmed.

Francis A. Kulp and *Stewart & Jacobs*, for complainant.

Warren H. Woodbury and *Lodge, Trevor & Brown*, for defendants.

MCALVAY, C. J. This is a suit in equity brought for the purpose of procuring the cancellation of certain of complainant's shares of stock held by defendants upon the ground that their issuance was procured by fraud.

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Complainant obtained a decree in the circuit court. Defendants appeal.

The material facts are as follows: In 1902, one Don Carlos Batchelder and defendants Adolphus D. Kirby and Charles H. Howard obtained an option or contract for the purchase of a tract of land in Cuba. They were to pay for this land the sum of $40,000. When they secured this option it was their plan to promote a company to whom it should be transferred. To enable them to make said transfer at an advanced price they had said contract of sale so drawn that it appeared that the purchase price was $60,000, of which $20,000 had been paid; whereas nothing had been paid and the purchase price was, as above stated, $40,000. They then returned to their home in this State and induced several gentlemen to unite with them in the formation of a corporation for the purchase of said land, representing to them that it was of great value; that they would turn it over to the corporation at what it cost, which was $60,000; that they had already advanced $20,000 in cash toward its payment, for which they would take stock in the corporation to be formed. Accordingly, a limited partnership association was formed, called the Cuba Colony Company, Limited. Its capital stock was $65,000, of which amount Batchelder, Howard, and Kirby subscribed for $20,000, and their associates $45,000. The $45,000 subscribed by said associates was paid in cash. The $20,000 subscribed by Batchelder, Howard, and Kirby was never paid, otherwise than by the relinquishment of their interest in said option or contract. Soon after its organization, said Cuba Colony Company, Limited, acquired title to the Cuba property, in accordance with the scheme of its promoters. Subsequently these same parties organized an association, called the Cuban Fruit Company, Limited, for the purpose of developing a certain portion of the property. They allotted the stock in this latter company to themselves in the same proportion as they held the stock of the Cuba Colony Company, Limited.

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In 1904 they made a plan for the organization of a new corporation which should succeed to all the rights of the two former associations, and to receive its stock in exchange for the stock formerly held by them. In accordance with this plan, the complainant corporation, the Cuba Colony Company, was organized. The new corporation, it is to be inferred, succeeded to all the rights of the two old ones. All the stockholders in the old companies surrendered their stock, and, with the exception of Batchelder, defendants Kirby and the two Howards (defendant Harriet E. Howard holds as security certain stock assigned her by her son, defendant Charles H. Howard), they received stock in the new corporation in exchange therefor. At this time knowledge of the actual cost of said property was acquired, and, therefore, the corporation refused to issue stock to defendants and to Batchelder. Soon thereafter this bill was filed. Batchelder is not made a party thereto, because he relinquished his stock. The circuit court rendered a decree canceling the stock in the names of Charles H. Howard, Harriet E. Howard, and Adolphus D. Kirby, and compelling the latter to repay the sum of $3,000 which he had obtained by selling a portion of his stock.

Defendants ask us to reverse that decree for several reasons:

First. They urge that Batchelder, Kirby, and Howard occupied no fiduciary relation toward complainant when they purchased this property, and, therefore, complainant is not entitled to relief. It may be conceded that, at the time the purchase was made, there was no such fiduciary relation; but complainant's right to relief does not depend upon the existence of the relation at that time. A fiduciary relation did exist at the time the corporation was formed and the property transferred. At that time Batchelder, Kirby, and Howard were promoters of the corporation, and towards it they were bound to act in good faith. The law governing this case is, in our judgment, correctly stated in *Lydney & Wigpool Iron Ore*

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Co. v. *Bird*, L. R. 33 Ch. Div. 85. The material facts in that case differ from the facts in this case in no particular favorable to defendants. We quote from that opinion. (The reader should understand that the defendant James Bird referred to in said opinion had done precisely what the promotors in the case at bar had done.)

"It is not correct to say that James Bird was the agent of the company when it did not exist; nor is it much less objectionable to talk of his being in a fiduciary relation to the company before the company had any existence. Moreover, to say that James Bird was a promoter of the company and therefore liable to account to it is calculated to mislead, for the word 'promoter' is ambiguous and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained. In every case it is better to look at the facts and ascertain and describe them as they are. In the present case James Bird procured the company to be formed and to be managed in such a way as to transfer from the moneys of the company to himself the sum of £10,800 without informing the company of that fact. The company were told that they had to pay £100,000 for the property but they did not know that of that sum £10,800 was to go into the pocket of the man who had got the company up and who had in fact increased the purchase money in order to get that £10,800. Under these circumstances he cannot retain the sum so got. Although not an agent of the company nor a trustee for it before its formation, the old familiar principles of the law of agency and of trusteeship had been extended and very properly extended to meet such cases; and using the word 'promoter' to describe a person acting as James Bird did, it is perfectly well settled that a promoter of a company is accountable to it for all moneys secretly obtained by him from it just as if the relationship of principal and agent or of trustee and cestui que trust had really existed between them and the company when the money was so obtained. Nor in such a case is it necessary for the company to rescind the whole transaction of which the payment by the company of the money in question is found to be part."

See, also, *Emma Silver Mining Co.* v. *Grant*, L. R. 11 Ch. Div. 918; *Erlanger* v. *Phosphate Co.*, L. R. 3

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App. Cas. 1218; *Simons* v. *Mining Co.*, 61 Pa. 202; *Plaquemines Tropical Fruit Co.* v. *Buck*, 52 N. J. Eq. 219.

Second. Appellants insist that the false representations made by the promoters were not credited by their associates, and, therefore, complainant is not entitled to relief. We answer this contention by saying that while several of the associates did doubt the truth of these false statements, they were finally led by said promoters to resolve said doubt in their favor, and act upon the assumption that said false representation was true.

Third. Appellants also contend that the maxim, "He who comes into equity must come with clean hands," debars complainant from relief, because after the acquisition of the Cuban property both it and its successors issued statements misrepresenting its value. Now that the promoters—who were largely responsible for the issuance of these false statements—have no longer any relation to the corporation, we do not believe that such statements will continue to be issued or that harm will come from those that have been issued. It is not to be assumed, therefore, that the decree in this case will be so used as to enable complainant to perpetrate a fraud similar in kind to that of which it complains. Under these circumstances the maxim relied upon by the defendants does not apply.

Fourth. It is urged that in any event some allowance should be made to the defendants for promotion expenses. In cases somewhat similar to this such allowance has been made. See *Emma Silver Mining Co.* v. *Grant*, L. R. 11 Ch. Div. 918; *Lyndey & Wigpool Iron Ore Co.* v. *Bird*, L. R. 33 Ch. Div. 85. The case at bar is, however, to be distinguished from those cases by this important circumstance not heretofore alluded to, viz., the promoters in this case represented to their associates—and their associates believed that representation—that there was to be no allowance for promotion expenses. Under these circumstances they are not entitled to them.

Fifth. It is contended that defendant Harriet E.

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Howard was a bona fide holder of the stock standing in her name and that that portion of the decree cancelling it is erroneous. This stock is held by Mrs. Howard as collateral security for an indebtedness of $1,475 owing her by her son, defendant Charles H. Howard. It is established by the testimony that Mrs. Howard had no knowledge of the fraudulent conduct of her son and took this stock in good faith. It is insisted, however, that inasmuch as the son was her agent, his knowledge will be imputed to her. In making the arrangement whereby this stock was taken as security, the son was not the mother's agent. Then he was acting for himself. His knowledge would not be imputed to her.

It is also insisted that Mrs. Howard is not entitled to hold this stock, because both she and her son in their testimony expressed confidence that the indebtedness secured thereby would be paid in any event. This is an argument utterly unsound. Mrs. Howard holds this stock legally as security for the payment of said indebtedness. To take it from her lessens the certainty of payment, impairs her security and deprives her of valuable property rights. She has, therefore, a right to continue to hold it. The decree of the circuit court must be so modified as to protect that right. It should at the same time give complainant the right to pay said indebtedness and cancel said stock, and, in case of said payment, to recover the amount thereof from defendant Charles H. Howard. As thus modified, the decree should be affirmed, with costs against defendants Kirby and Charles H. Howard. Defendant Harriet E. Howard is entitled to costs in both courts.

CARPENTER, GRANT, HOOKER, and MOORE, JJ., concurred.

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CITY OF MUSKEGON v. HANES.

1. HAWKERS AND PEDDLERS—WHAT CONSTITUTES PEDDLING.
An ordinance prohibiting hawking and peddling without a license is violated by going without a license from door to door and leaving articles on approval to be returned or paid for at a later date to another servant of the owner.

2. SAME—INTERSTATE COMMERCE.
There is no interference with interstate commerce in requiring a license of one who distributes articles of merchandise, shipped here in bulk from another State, to be returned or paid for at a later date to an associate of the distributor.

Error to Muskegon; Sessions, J. Submitted June 12, 1907. (Docket No. 86.) Decided September 20, 1907.

Mary A. Hanes was convicted of peddling without a license, and sentenced to pay a fine of $50 or in default thereof to 30 days' imprisonment in the county jail. Affirmed.

Cross, Lovelace & Ross, for appellant.

James E. Sullivan, for appellee.

CARPENTER, J. We adopt the opinion of the learned trial judge—Judge Sessions—rendered in disposing of this case in the circuit court. That opinion reads as follows:

"By stipulation in open court a jury was waived by the defendant and the case submitted to the court for determination.

"The facts in this case are undisputed. It appears from the evidence that the Raydith Manufacturing Company on the first day of last July was a corporation organized under the laws of the State of Illinois, and manufacturing perfumes in the city of Chicago in that State; that the defendant was in the employ of that corporation and

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was working for it in the city of Muskegon on that date; that prior to coming to the city of Muskegon, and on or about the 18th or 20th day of June, the defendant was working in Grand Rapids in this State, and that from June 18th or 20th until the first day of July, and perhaps a day or two thereafter, she, together with others, associated with her and under direction, was working for this Illinois corporation in this city. When the defendant came to the city of Muskegon she brought with her the goods which she was distributing, or a portion of them; she brought with her a sufficient stock to enable her to do business for a time, and whenever the stock needed replenishing she had the goods shipped from this corporation in the city of Chicago to her in the city of Muskegon, either by express or by freight; that before any goods were distributed by her or her associates such goods had been shipped to the city of Muskegon and were within this State. It appears also that the defendant had her expenses paid by the Raydith Manufacturing Company, and in addition thereto she was paid by that corporation a commission upon all of the goods that were sold or disposed of by herself or her associates. There came with her to the city of Muskegon two others, whom she terms canvassers, and the method of their operation was for the defendant and the two canvassers, who were acting under her direction and orders, to go about the city of Muskegon from house to house and leave packages of perfumery, the packages or cases containing ten small bottles of perfumery, preferably these packages of perfumery were left at houses where there were children, the defendant or one of the canvassers under her direction informed the householder at the time of leaving the package of perfumery that the price would be so much, that the householder or the children could either retain the perfumery or dispose of it to others, and in case it was sold or retained, that a premium would be paid or given for the sales in proportion to the number of bottles that were sold; in case ten bottles were sold the premium was to be three bottles of the perfumery; in case seven bottles were sold it was to be two. The householder was also informed at the same time that another person, termed as a collector, would be at the house within a certain length of time to collect the bottles of perfumery that had not been sold or retained, and to collect the pay for the perfumery which had been sold or retained.

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"In this city a canvass was made of certain parts of the city by the defendant and the two canvassers under her, and in about ten days the collector went the rounds and made the collections. In this particular instance the collector was the daughter of the defendant, and while here roomed with the defendant and paid the expenses of the room. The defendant claims that she did not receive any of the money collected for the perfumery sold; that her expense account was made up and sent to the Manufacturing Company in Chicago; that the moneys collected were remitted direct to the Manufacturing Company in Chicago; that she had nothing to do with that; that the collector was not under her direction or orders.

"It appears in the evidence that sales were actually made in the manner that I have described here in the city of Muskegon and collections made; that the defendant participated in the distribution of the goods and was a member of the crew, as she termed it, that were canvassing.

"No attack is made upon the validity of the ordinance in question, either as to its reasonableness or as to the authority of the council of the city of Muskegon to adopt such an ordinance, or as to the regularity of the proceedings in adopting the ordinance, or as to the right of the city to enforce the provisions of this ordinance in a proper case.

"Counsel for defendant contends, *first*, that under the facts in this case, the defendant has not violated any provision of the ordinance in question, in that she made and consummated no sales herself and collected none of the money; and, *second*, that as applied to the facts in the case, the ordinance is inoperative, being in restraint to interstate commerce.

"I am unable to agree with counsel for defendant as to the first contention. The ordinance itself provides by section 1 that no person or persons shall engage in the business of hawking or other peddling in the streets or other public places or from door to door, or in selling any article of trade or commerce whatsoever on any public street, park ground, alleys or places in the city of Muskegon, without first having obtained a license therefor.

"It appears in the evidence that no license was obtained by the defendant and that whatever she did she did without first having obtained a license.

"By section 4 of the ordinance, it is provided that the

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amount to be paid for the license provided for in this ordinance shall be as follows: For drugs, toilet articles, perfumes, cosmetics and toys, one dollar for one day, and three dollars for one week.

"Section 6 of the ordinance defines the term hawker or peddler and designates the persons who shall be deemed hawkers and peddlers under the provision of this ordinance. It is as follows:

"'Any person or persons who shall go about from house to house or place to place and sell or offer to sell any articles of trade or commerce to be delivered then or in the future, shall be deemed a hawker and peddler within the meaning of this ordinance.'

"I do not think that it is necessary to constitute a violation of the provisions of this ordinance that there should be an actual sale of the goods. It is sufficient, in my judgment, if there is an offer to sell, and a going about from house to house or place to place within the city of Muskegon, offering to sell goods [*People* v. *Sawyer*, 106 Mich. 428], and the conclusion is inevitable that the actions of the defendant and her associates of those under her, the canvassers, in going about and distributing these bottles of perfumery, with the instructions given to the householder at the time of such distribution, constituted an offer to sell the goods. The parties to whom the goods were delivered were each and every one offered the opportunity of purchasing the goods, and the purpose of the entire transaction was to sell the perfumery.

"I am also unable to agree with counsel for defendant upon the second contention. It appears conclusively that the goods were first shipped to the defendant in the State of Michigan before they were even distributed. This is not a case where a canvasser doing business for a foreign corporation or a nonresident of this State goes about taking orders, the orders to be filled by the manufacturer and delivered to the customer or delivered and shipped to the agent to be delivered to the customer, as was the case in *People* v. *Bunker*, 128 Mich. 160, where our Supreme Court followed the decision of the United States Supreme Court in *Brennan* v. *City of Titusville*, 153 U. S. 289. Because in this case, as I have stated, the goods were already within the State before they were offered for sale.

"It seems to me that this case falls squarely within the decision of our court in the case of the *City of Muskegon* v. *Zeeryp*, 134 Mich. 181. I am unable to distinguish

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this case from that one in principle, and in that case our Supreme Court expressly distinguished the case of the *People* v. *Bunker* and the United States court case followed by our Supreme Court. I might say that upon the other branch in addition to what I have said that even if the defendant could not be convicted upon a mere offer of sale, in my judgment, all of the parties, the canvassers, the collectors and the defendant, were engaged in one transaction, they were participants in the one transaction, the one party offering the goods for sale, the other collecting the money; and, in my judgment, each of the participants in that transaction was a seller of the goods.

"The defendant therefore will be adjudged guilty."

The judgment is affirmed.

McALVAY, C. J., and GRANT, HOOKER, and MOORE, JJ., concurred.

PEOPLE *v.* BROCK.

CONSTITUTIONAL LAW—TRIAL BY JURY—CRIMINAL LAW—VENUE OF PROSECUTION—LARCENY FROM RAILROAD CAR EN ROUTE.

Section 11633, 3 Comp. Laws, providing that larceny in a railroad car en route may be prosecuted in any county through which the car passes, is invalid as in conflict with section 27, article 6, of the Constitution, guaranteeing trial by jury.

Error to Oakland; Smith, J. Submitted June 13, 1907. (Docket No. 119.) Decided September 20, 1907.

Leo Brock was convicted of stealing from a railway car, en route, under 3 Comp. Laws, § 11633, and sentenced to imprisonment for not less than 2½ nor more than 5 years in the State prison at Jackson. Reversed.

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Rockwell & Zimmermann, for appellant.

Frank L. Covert, Prosecuting Attorney, and *C. S. Matthews*, Assistant Prosecuting Attorney, for the people.

HOOKER, J. The defendant was convicted of stealing property from a car en route from Detroit to Ovid, under 3 Comp. Laws, § 11633. He was convicted in Oakland county, and the proof indicated that the act was committed in the adjoining county of Wayne and not in Oakland county, and no testimony was offered tending to show that the articles were stolen in Oakland county, where the information alleges that they were stolen. The court instructed the jury that the defendant might, lawfully, be convicted of the offense charged, although the theft was committed in the county of Wayne and not of Oakland. This was clearly error unless the same was justified by the statute cited, which provides:

"That every person who shall commit the crime of larceny in a railroad car while in the State of Michigan, and en route, shall be liable to prosecution in any county through which said car passes, and any court of competent jurisdiction of said county shall have jurisdiction to try and determine said cause the same as though said offenses had been committed in the county where the complaint is made."

Counsel for respondent claim that said section is in conflict with article 6, § 27, of the Constitution, i. e.:

"The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law."

The case of *Swart* v. *Kimball*, 43 Mich. 443, construed this section of the Constitution, holding that the right there reserved to the people was trial by jury as it had become known to the previous jurisprudence of the State, one of the essentials of which was a trial in the county where the alleged offense was committed. In that case

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a prosecution for trespass on State lands was attempted in a county other than that in which the lands were situated. The act was held void.

It is contended that the statute upon which the case now before us rests, is distinguishable, and may be sustained. This claim may be resolved into the suggestion that when property has been stolen from a railroad car in transit, there may be difficulty in proving where the car was, at the time the property was taken, and therefore that there is a necessity for such a statute, otherwise the offense cannot be charged with any degree of accuracy or certainty of conviction.

It is no uncommon thing to have criminal prosecutions fail for want of proof, and while the danger of such failure may be greater in this class of cases than in others, it is not made clear to us how a man can be lawfully deprived of a constitutional right for such a reason. It would be a startling innovation should we say that the legislature has power to subject a person charged with crime to prosecution in any one of several counties, covering a strip of territory coextensive with the length or breadth of the State, at the prosecutor's election, and yet, that is what this statute authorizes if it is valid. It cannot be said that this offense was in "contemplation of law" committed in each of said counties, as in a case where property stolen in one county is carried by the thief into another, or possibly where an act done in one county contributes to the commission of the offense in another. See 2 Wharton on Criminal Law, § 1397.

Whatever may have been held by the courts of other States, the cases of *Swart* v. *Kimball*, supra, and *Hill* v. *Taylor*, 50 Mich. 551, settle the rule for Michigan. It is unnecessary to pass on other questions raised.

The judgment is reversed, and a new trial ordered.

MCALVAY, C. J., and CARPENTER, GRANT, and MOORE, JJ., concurred.

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MUDGE v. SUPREME COURT INDEPENDENT ORDER OF FORESTERS.

1. LIFE INSURANCE—APPLICATION FOR POLICY—BREACH OF WARRANTY—WAIVER.

   Where an applicant for a life-insurance policy intentionally falsified in giving his answers to questions concerning his health in the past, the facts that both the agent who took the application and the physician who made the examination knew the answers were false, notwithstanding which they wrote the answers as given, do not constitute a waiver, or estop the company from denying the truth of the answers.

2. SAME—ACTION ON POLICY—BREACH OF WARRANTY—EVIDENCE—SUFFICIENCY—PRESUMPTION ON APPEAL.

   Where a life-insurance policy makes the by-laws of the company a part of the contract, the failure of the company to offer the by-laws in evidence in an action on the policy will not require reversal of a judgment in its favor, the judgment being founded on a breach of promissory warranty sufficiently shown by the physician's examination and the policy.

Error to St. Clair; Law, J. Submitted June 11, 1907. (Docket No. 72.) Decided September 20, 1907.

Assumpsit by Elizabeth Mudge against the Supreme Court Independent Order of Foresters upon a benefit certificate. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

John B. McIlwain, for appellant.

Elliott G. Stevenson (*Cyrus A. Hovey*, of counsel), for appellee.

HOOKER, J. The plaintiff in this cause is a widow, and beneficiary in a fraternal benefit certificate. Her action is brought to recover the amount thereof, and is predicated upon the death of her husband. The defense

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is reduced to one claim, viz., that the deceased made an intentionally false answer, in his medical examination, to the question "Have you ever had the disease of insanity?" Upon the trial the learned circuit judge was of the opinion that the undisputed testimony established this defense, and he therefore directed a verdict for the defendant and afterwards denied a motion for new trial. The plaintiff has appealed.

The undisputed testimony shows that the insured had previously been insane, and confined in the asylum as insane, for three months, upon an adjudication by the probate court that he was insane, based upon an application sworn to and filed by this plaintiff stating that he was insane. It also shows that he had delusions, and that he had attempted suicide twice. It appeared with equal conclusiveness that he knew that he had been confined and treated as insane, and there was no testimony that he stated these facts to the agent or examining physician and was not a party to the insertion of the false answer in the application or report of the examining physician. On the contrary it was shown that his answers were faithfully recorded. There is no occa ion to allude to the attempted discrimination between "insanity" and the disease of insanity under the facts in this case. Hence we find that upon this record, the judge was warranted in saying that the proof established the insured's insanity, his knowledge of and fraudulent concealment of the same. There can be no question that this was sufficient to deprive his beneficiary of the right to recover, unless the company was estopped to assert the claim by reason of the alleged knowledge of its agents, or by a waiver.

It is contended that there was evidence tending to show that both the agent who took the application, and the physician who made the examination, knew, at that time, that the insured had been insane, and that his answers were false, and that this was the knowledge of the defendant, and is sufficient to estop it from denying the truth of the answer. Were this a case where the insured

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had made no misrepresentation in his answer, and was excusably ignorant of fraudulent conduct on the part of the company's agent in inserting an answer different from that given, there might be reason for this claim. In this case the most that plaintiff's counsel could possibly contend, is that, by collusion between the applicant and defendant's agent, they made a false answer, and now seek to hold the company, by making a "sword instead of a shield" out of the salutary rule, that the knowledge of the agent is notice to the principal. Good faith is always essential to an estoppel.

In *American Ins. Co.* v. *Gilbert*, 27 Mich. 428, where the insured answered truly, but the agent inserted a false statement, *with his knowledge*, stating that it was right, and the insured signed, *honestly believing* that *it was* right, this court in reversing a judgment for plaintiff said:

"The very form and obvious purpose of the application with the consideration contained in it, showed that the statements it contained were to be understood as made by the applicant and upon his responsibility, as the basis of the contract of insurance he expected to obtain. And, though a person ignorant of the meaning of the particular terms of special provisions used in such papers, or in the policy, or of the sense attached to them by the insurers, or of the particular rules or manner of doing business, has a right to rely on the instructions and assurances of the agent of such insurers, and upon his acts in reference to such matters, in filling out the application; yet he cannot, therefore, escape the responsibility for the statement of facts which he inserts himself in the application, or permits the agent to insert, as his, upon which he is just as well informed as the agent himself."

In the case of *Michigan Mut. Life-Ins. Co.* v. *Reed*, 84 Mich. 532, the court said:

"If the insured had no information of the agent's misrepresentation, the company could not take advantage of the wrong of its agents and avoid the policy, but that it would have been otherwise had the insured conspired with the agent or had the insured, being fully informed of the

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representation made and the contents of the application, neglected to bring it to the attention of the company."

In the recent case of *Ketcham* v. *Accident Ass'n*, 117 Mich. 521, Mr. Justice MOORE said, with the approval of the full bench, that—

"It is urged that, as the agent knew the answers were not true, his knowledge was the knowledge of the company, and, having issued the policy, the company is bound. The courts have always been anxious to take care of the rights of the assured when the applicant has relied upon the agent informing the company what had been truthfully told to him about the character of the risk; but the courts never have said the company is bound by statements contained in an application, when not only the agent, but the assured, knows they are untrue, and calculated to deceive, and the application is to be forwarded to the company as the basis of its action. To so hold would put these organizations completely at the mercy of dishonest and unscrupulous agents."

In the case of *Maier* v. *Life Ass'n*, 24 C. C. A. 243, 78 Fed. 570, Mr. Justice Harlan used the following vigorous language:

"It was said in argument that the company should not be permitted to take advantage of the misconduct or wrong of its own agent. But the law did not prohibit the company from taking such precautions as were reasonable and necessary to protect itself from the frauds and negligence of its agents. If the printed application used by it had not informed the applicant that he was to be responsible for the truth of his answers to questions, and if the want of truth in such answers was wholly due to the negligence, ignorance, or fraud of the soliciting agent, a different question would be presented. But here the assured was distinctly notified by the application that he was to be held as warranting the truth of his statements 'by whomsoever written.' Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some, that the courts may in their discretion, relieve parties from the obligations of their contracts, whenever it can be seen that they have acted heedlessly or carelessly in making them, but it is too often forgotten

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that in giving relief, under such circumstances, to one party, the courts make and enforce a contract which the other party did not make or intend to make. As the assured stipulated that his statements, which were the foundation of the application, were true, by whomsoever such statements were written, and as the contract of insurance was consummated on that basis, the court cannot, in an action upon the contract, disregard the express agreement between the parties, and hold the company liable, if the statements of the assured—at least, those touching matters material to the risk — are found to be untrue."

In *New York Life-Ins. Co.* v. *Fletcher*, 117 U. S. 519, Mr. Justice Field said:

"A curious result is the outcome of the instruction. If the agents committed no fraud, the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud, he may recover, although, upon the answers given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained."

There are many decisions elsewhere which refuse to apply the rule of estoppel in cases of this kind. 3 Cooley's Briefs on Insurance, p. 2569; *Welsh* v. *Assurance Corp.*, 151 Pa. 607; *Pottsville Mut. Fire-Ins. Co.* v. *Fromm*, 100 Pa. 347; *United States Life-Ins. Co.* v. *Smith*, 34 C. C. A. 506; *Clemans* v. *Supreme Assembly R. S. of G. F.*, 131 N. Y. 485 (16 L. R. A. 33); *Boyle* v. *Relief Ass'n*, 95 Wis. 318; *Provident Sav. Life Assurance Society* v. *Llewellyn*, 7 C. C. A. 581 (22 L. R. A. 620).

The case of *Perry* v. *Insurance Co.*, 143 Mich. 295, 147 Mich. 645, is said to establish for this State a different rule and to have overruled the three cases quoted from. Upon its first hearing that case might have turned either on the question of waiver, or on the substantial truth of the answer; it appearing that there was evidence that defendant's agent knew the insured's character when he wrote the policy, and the company's superintendent afterwards collected premiums with knowledge of her occupa-

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tion. We held there that unless the warranty that she was a housewife was substantially true, or its truth waived, the policy was void, and that these were questions for the jury. It is a legitimate conclusion that although she maintained a bawdy house, which the court said was incontestably proved, that it did not necessarily follow that her statement that she was a housewife and had not been in any other occupation for two years was not substantially true. One of the definitions of housewife, viz., "a female manager of domestic affairs," was quoted in the opinion."

Upon a second trial the claim that defendant's superintendent collected premiums was eliminated upon this question. The learned circuit judge instructed the jury:

"It does not seem to me that it is a conclusive question, because I think if the money was paid—if the agent at the time he took this application knew of her character and they gave her occupation as housewife, instead of prostitute, that I still think the company would be liable, and in this case I do not think the question is a conclusive question."

This was sustained. It cannot be denied that this gives plausibility to the claim that defendants make, viz., that although both insured and agent knew of her disreputable character and the omission to state it, the knowledge of the agent estopped the defendant. It should be considered, however, in the light of the previous opinion, viz., that her answer might be found substantially true, i. e., that she was a housewife, and that she had not engaged in other occupations within two years. This part of the charge related to the question of waiver, which the court held was not the only question in the case. If he had used the word "might" instead of "would" the decision would not have the significance contended for, and it is quite probable that this language may have been qualified by other portions of the charge relating to the other question in the case. Counsel pertinently suggest that no allusion was made to the cases quoted from. They

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could not well have been overlooked and would not have been ignored had there been an intention to overrule them.

Counsel have raised the further point that the defense should have been held to have failed for another reason. The by-laws formed a part of the contract, and were not offered in evidence by the defendant. The policy and the physician's examination were sufficient to show the breach of contract, and if plaintiff's counsel had claimed that the by-laws would have shown the contrary they would doubtless have produced them. To reverse the judgment upon this ground would be to do so for a very technical reason or upon a presumption that the by-laws nullified the express provisions of the policy. The plaintiff has failed to show any error, and the judgment is affirmed.

McALVAY, C. J., CARPENTER, GRANT, and MOORE, JJ., concurred.

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WHITE v. OWOSSO SUGAR CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—DANGEROUS EMPLOYMENT—WARNING.

Plaintiff, a common laborer, was directed by his master to assist in holding up and bolting to place an iron plate forming a part of the spout of a bucket conveyor in a beet sugar mill, and while that duty was being performed one corner of the plate got inside the spout, caught on a descending bucket, and injured plaintiff. *Held*, that whether plaintiff's employment as a common laborer comprehended that duty was immaterial, the danger being so apparent as to call for no warning.

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2. SAME—NEGLIGENCE OF MASTER—INSUFFICIENT HELP.
Negligence of the master in not providing sufficient help to handle a heavy article is not available to a servant injured while handling it while other employés of the master stood by and could have aided had it been thought necessary.

3. SAME—ASSUMPTION OF RISK.
A servant employed at common labor cannot recover of his master for an injury received while handling a heavy article, the danger being obvious, and the master having no knowledge of the danger that the servant did not possess.

Error to Shiawassee; Miner, J. Submitted June 12, 1907. (Docket No. 85.) Decided September 20, 1907.

Case by Robert White against the Owosso Sugar Company for personal injuries. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Walsh & Pardee, for appellant.

Keena, Lightner & Oxtoby, for appellee.

HOOKER, J. The plaintiff has appealed from a verdict of "no cause," directed by the court, upon the conclusion of the testimony in a personal injury case. Briefly stated, the facts proven are, that he applied to the defendant for common labor at its factory, where he had worked before, and was told that he could have a job on the diffusion tanks. His duty in that regard was to open and close the doors of certain tanks, at proper intervals, and aid in the removal of their contents, which consisted of beet pulp. It is unnecessary to describe his duties at length. There was an apparatus in the factory for elevating pulp. It consisted of buckets attached to endless chains which ran upon pulleys, and resembled, in a general way, the elevators in a mill, in principle, though it ran in a larger shaft. It is manifest that the buckets ran upward on one side and down on the other. The shaft was sheet iron sides with angle iron corners, and near the lower end of

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the shaft, in the basement, there was a place in the shaft which could be opened by taking off one of the side plates, which was done by removing the bolts by which it was usually fastened to the vertical angle iron corners. On the day of the accident this elevator had been undergoing examination or repair, and the plate mentioned had been taken off, the elevator having been stopped for the purpose. It being desired to replace this plate, the plaintiff was called from his work, and directed to aid another man in raising it up to its proper place, so that the bolts could be put in and made secure, which they proceeded to do, the elevator having been started in his presence for examination of the buckets and being running at the time. This plate probably weighed somewhere from 135 to 200 pounds, the testimony being in conflict in this regard. In lifting the door up they allowed one corner to go inside of the shaft, where it was struck by the descending bucket, and pushed downward to the injury of the plaintiff. It is a reasonable inference that the iron was pretty heavy and got momentarily beyond their control, with the above result. It is not clear which if either of the men was responsible for its tipping against the bucket, or whether it was due to the negligence of either. The plaintiff claimed that the defendant was negligent:

1. In giving him this task without warning him of its perils.
2. In not providing more help to lift and hold up the door.
3. In failing to give plaintiff a safe place to work.

The defendant insists that this was labor of the most common kind, that warning of its dangers was unnecessary, because they were apparent, that plaintiff was in a better situation to know whether more help was required than defendant was, and did not ask assistance although there were two or three men standing by who could as well have given it had it appeared necessary. Counsel maintain therefore that the plaintiff assumed the risk of the work.

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The labor for which plaintiff applied was common labor. That which he was set at work upon was such. It does not necessarily follow that he engaged to do whatever in the nature of common labor his employer should afterwards direct him to do, though a jury might reasonably infer that he did engage to do so, from the nature of his application, his former employment (when he did various kinds of work), and his ready acquiescence when asked to go with his superior to do the work in question. It is perhaps more reasonable to suppose that he expected to do any work about the factory that he should be set at, and that his employer so understood the employment, and felt at liberty to change his work at will. Emergencies of greater or less importance necessarily arise in the conduct of a manufacturing business, calling for unusual work, and in such cases it probably is not unusual to call men from their regular routine duties for special work, and to say that the master necessarily assumes the risk of injuries that result, is going too far. In this case the work to be done was to bolt an iron plate upon the frame of an elevator shaft. It was four feet square and a quarter of an inch thick. It was necessary to raise it up so that its top side was six or seven feet above the floor and to hold it in place until it could be secured by bolts. This in itself was nothing more than common labor, and ordinarily would call for no superior intelligence. It would be a very low degree of intellect that would not understand the danger that would follow the contact of the iron plate with the descending buckets, which were in motion when the plate was lifted, and the danger to be apprehended from such contact was so apparent to any one, that we think it was not negligence in the master to omit calling special attention to it. We have often said that it is not negligence to omit warning against an obvious danger. See *Swick* v. *Cement Co.*, 147 Mich. 454, where the subject is dicussed and authorities are cited, also *Bauer* v. *Foundry Co.*, 132 Mich. 537. It is therefore unimport-

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ant, so far as warning is concerned, whether this was within the scope of plaintiff's engagement or not. *Gavigan* v. *Railway Co.*, 110 Mich. 71.

It is contended that the defendant was negligent in not providing more men to aid in lifting the plate. It is inferable from plaintiff's testimony that it was so heavy that the two men could not hold it, and that it wobbled and slipped out of place, and a corner got inside of the shaft and was struck by a bucket. The record shows that other men stood idly by and could have aided had it been thought necessary. There is some dispute in the testimony concerning the feasibility of using more men. The plaintiff's own testimony shows that one Connors who was engaged in the work told plaintiff and another to lift up the plate, and that he took hold of it the way he was told to do.

There is no proof of the master's negligence in the record and we think that the plaintiff assumed the risk of the obvious danger through which he was hurt. The case is similar to *Nephew* v. *Whitehead*, 123 Mich. 255. It was there said:

"An employé, experienced in handling heavy objects, cannot recover against his employer for injuries received by being struck by an iron beam which he was assisting to unload from a wagon on which he had helped to load it; the operation being a simple one, and the employer having no knowledge of danger that the employé did not himself possess."

The court in conclusion in that case says, on page 257, as follows:

"If the plaintiff can recover in this case, an employer of labor would be liable whenever an accident occurred. The operation to be performed was a simple one. With the experience plaintiff must have had in handling heavy objects, he must have known as much about the danger as any one. See *Pilucki* v. *Spring Works*, 117 Mich. 111. We do not deem it necessary to discuss the case."

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See, also, *Roepcke* v. *Railroad Co.*, 100 Mich. 541; *Timm* v. *Railroad Co.*, 98 Mich. 226.

The question of safe place is not involved in the case.

The judgment is affirmed.

McALVAY, C. J., and CARPENTER, GRANT, and MOORE, JJ., concurred.

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BANGS *v.* BROWNE.

1. EXECUTORS AND ADMINISTRATORS — ACCOUNTING — REOPENING ESTATE—FRAUD—EVIDENCE—SUFFICIENCY.

On a bill against executors and a bank to reopen an estate and for an accounting, evidence examined, and *held*, that there is an entire failure to establish the claim that a gift by decedent of money in the bank to his stepdaughter, shortly before he died, was a collusively corrupt attempt to rob the decedent, to which the bank, through its officers, was a party.

2. SAME—APPEAL—QUESTIONS CONSIDERED—TESTIMONY ADMISSIBLE.

Where there is an entire failure to prove that a transaction with a deceased person was a fraud upon him, as claimed, it is not necessary to determine the admissibility of testimony explaining the transaction offered by defendants and objected to as being matter equally within the knowledge of deceased.

3. GIFTS—VALIDITY—ACCEPTANCE—PRESUMPTION.

Acceptance will be presumed in support of the validity of a gift of money in bank, though the donee did not know of it until after the donor died, where the donor wrote a check which was taken to the bank and deposited to the donee's credit, and the amount thereof entered in a pass book kept in the bank, with other customers' books, subject to call by her.

Appeal from Kalamazoo; Adams, J. Submitted June

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13, 1907. (Docket No. 35.) Decided September 20, 1907.

Bill by Vital E. Bangs and others against Ella Browne, and Robert J. Williamson and J. Davidson Burns, executors of the last will and testament of Henry Brees, deceased, and the Kalamazoo Savings Bank, to reopen an estate, and for an accounting. From a decree dismissing the bill, complainants appeal. Affirmed.

N. H. Stewart (*S. M. Meek* and *C. C. March*, of counsel), for complainant.

Dallas Boudeman, *Alfred J. Mills*, and *Thomas W. Browne*, for defendants.

HOOKER, J. The wife of Henry Brees was twice a widow, before she married him, which she did in 1848. At that time she had four children, whose father was named Bangs, he being her first husband, and one named Soledad La Vegas, a daughter of her second husband. All came to Kalamazoo, and were brought up in the family of Brees. Their mother died many years ago, after which time Soledad Drake, formerly LaVegas (a widow), and her two daughters, Ella and Jennie, took up their abode with him, and managed his household affairs until he died April 30, 1897. He was then 88 years old.

Brees was a man of some wealth, his estate having inventoried $180,000. Robert J. Williamson and J. Davidson Burns, his associates in business, settled his estate as executors, under a will made by him some three years before his death, in which several, if not all, of the complainants now claim to be residuary legatees, either in their own right or through representation. The evidence indicates that they were disappointed in the amount of the estate, and that some of them, especially Mrs. Taylor, a daughter, and one Cooney, a son-in-law of Mrs. Taylor, claimed and did not hesitate to charge the executors with having covered up and diverted a large amount from the

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estate. Some seven years after the death of Brees, and some time after the estate was closed and the executors discharged, the bill in this case was filed. The defendants are Ella Browne (formerly Drake), the two executors as such, the Kalamazoo Savings Bank, and Soledad Drake, and it charges in substance, among other things, that the executors and the bank colluded with Ella Browne and her mother to filch $80,000 from the estate and put it in the possession of Ella Browne, which sum or a part of it was alleged to have been used in partially erecting a valuable building. It prayed: *First.* That the order settling the final account and discharging the executors be set aside, the estate reopened, and kept open until the final order of the court in this cause. *Second.* That defendants be required to produce books and papers. *Third.* That they come to a fair accounting for the said $80,000 and interest, and that the same and any other property formerly belonging to Henry Brees be restored to the estate. *Fourth.* A preliminary injunction to protect the estate. Upon the hearing the bill was dismissed as to Soledad Drake, and later it was dismissed as to all of the defendants, and the complainants have appealed.

The case really involves but one transaction, viz., the bona fides of an alleged gift of $80,000 to Ella Browne a few weeks before the death of Henry Brees. Two questions of law are raised, one crucial, and the other of more or less importance, depending upon the view taken of the testimony. The first is whether this alleged gift necessarily failed for want of acceptance by Ella Browne before Henry Brees died; the other how far, if at all, testimony given by the several defendants was inadmissible under the statute.

The books produced upon the hearing show that on March 2, 1897, Henry Brees had two accounts in the defendant bank, one a savings account, amounting with interest to $80,993.73, the other a commercial account of some thousands. This appeared from the bank pass books

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held by Brees and from the books of the bank, which agreed with them.

On March 2, 1897, a check to Ella Drake, admittedly written by Williamson, and purporting to be signed by Brees, was paid by the balancing of the savings account of Brees; $80,000 being transferred to an account then opened by the bank with Ella Drake, and $993.04 transferred to the commercial account of Brees and entered upon his commercial bank book. This item of $80,000 was not accounted for nor mentioned in the inventory of the Brees estate. Brees died about two months after the transaction mentioned and apparently the executors treated the deposit as no longer his; and in this they were clearly justified unless, as counsel for complainant claim, this was a collusively corrupt attempt to rob Mr. Brees, to which the bank through its officers was a party.

The complainants' proof consists largely of interviews between Mr. Cooney and his counsel, Mr. Meek, of Illinois, and Mr. Williamson, from which counsel ask us to find evidences of fraud and wrongdoing on the latter's part, and to infer collusion in the transaction referred to; but we are not thus impressed. On the contrary, we believe the statements of Mr. Williamson because they seem much more reasonable and probable. This leaves very little of complainants' case. There is nothing so unnatural in the preference shown Ella Browne by Henry Brees in the division of his estate as to shock any one, unless it be the disappointed stepbrothers and sisters and Mr. Cooney. Soledad Drake and her daughters had lived with him long and he had provided bountifully for them in life. Why should he not feel concern for them after he should be gone? Apparently there was warm affection toward Soledad and her children on his part. An unfortunate son of Soledad was hopelessly insane and would need to be provided for, and there is evidence that his relations with Ella were close and friendly. We find nothing showing such a relation to the older children and

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their descendants that makes this preference unreasonable. He was under no obligation to leave them anything. Had he not left a will they would have had no interest in this estate, as they are not the heirs of Henry Brees. It is as residuary legatees that they make this contest.

We have so far said nothing of the testimony of the defense relating to the transaction at the residence of Henry Brees, where he is said to have directed the drawing and signed the check, with directions as to its disposition, because we feel fully warranted in saying from the other evidence that the complainants have signally failed to prove a charge of wholesale fraud, corruption, and crime on the part of people apparently respectable. It is but fair to say that there is evidence in the case which, if admissible and believed, wholly refutes this charge. We do not discuss it or rest the case upon it, and it is therefore unnecessary to decide what portions of the testimony of Ella Browne, Mr. Williamson, and others, if any, is within the statute which excludes the testimony of parties to matters equally within the knowledge of deceased.

It only remains to refer to the question of law relating to the nonacceptance of the gift. The evidence shows that Ella Browne did not know that Mr. Brees made this check at the time he is said to have made it. It was taken by the bank, placed to her credit, and her pass book kept in the bank with other customers' books subject to call by her, but it is claimed she was not informed of the circumstances until after the death of Mr. Brees. It is claimed that this fact shows that she did not accept the gift, and is fatal to it. Acceptance may be presumed in this case, even if we reject the testimony of Ella Browne as to the talk with Mr. Brees about it the night before he died. *Green* v. *Langdon*, 28 Mich. 221; *Ellis* v. *Secor*, 31 Mich. 185; *Bostwick* v. *Mahaffy*, 48 Mich. 345; *In re Dunlap's Estate*, 94 Mich. 11; *O'Neil* v. *Greenwood*, 106 Mich. 572; *Holmes* v. *McDonald*, 119 Mich. 566; *Lewis* v. *Curnutt*, 130 Iowa, 437, and cases cited.

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In this case there was a plain delivery of a check, presented at the bank, paid by transfer of the fund to the payee, Ella Drake, and evidence thereof kept in the bank subject to her call. There is not the slightest evidence that Mr. Brees had any control of the fund or the book at any time. The decree is affirmed, with costs.

McALVAY, C. J., and CARPENTER, GRANT, and MOORE, JJ., concurred.

LONIER v. STATE SAVINGS BANK.

BANKS AND BANKING — CHECKS — PAYMENT — FRAUD OF PAYEE'S AGENT—LIABILITY OF BANK.

Where plaintiff's agent accepted a check in payment of an account, and without authority indorsed plaintiff's name upon it, presented it at the bank upon which it was drawn, received the money upon it, and absconded without accounting to plaintiff, and the bank charged the check to the drawer and returned it to him as paid, the bank is not liable to plaintiff for the amount of the check, either on the theory that it received the money from the drawer for plaintiff's use, or that money was paid to the bank for plaintiff's use.

Error to Washtenaw; Kinne, J. Submitted June 14, 1907. (Docket No. 95.) Decided September 20, 1907.

Assumpsit by Louis Lonier and William J. Hoffer, copartners as Lonier & Hoffer, against the State Savings Bank for money had and received. There was judgment for defendant on a verdict directed by the court, and plaintiffs bring error. Affirmed.

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A. F. & F. M. Freeman, for appellants.

Arthur Brown, for appellee.

HOOKER, J. This cause was disposed of on the conclusion of plaintiffs' testimony, a verdict for defendant being directed.

The testimony was in substance that plaintiffs were merchants and defendant the banker of Staebler & Co., their customer. They employed one Donaldson as a drummer, and it was his duty to sell goods, and sometimes he was directed to settle accounts. On June 13, 1906, Staebler & Co. were indebted to the plaintiffs. Donaldson called upon them and settled the account, taking their bank check payable to plaintiffs or their order for $92.30. Donaldson took the check to the bank upon which it was drawn and without authority indorsed the names of the payees upon the back of the check and received the money upon it. The bank charged the check to Staebler & Co. and returned them the check marked paid. Donaldson never accounted to the plaintiffs for the money. About a month later Donaldson again called on Staebler & Co. to sell goods, and again made a settlement of account, Staebler & Co. again giving their check, payable as before, for $101.50, and again Donaldson collected the money in the same way and without authority, and in due time the check was returned to Staebler & Co. in the course of business, being charged by the bank against their account. Donaldson never accounted for this money, but absconded.

This action is brought against the savings bank to recover the amounts of plaintiffs' claims represented by the checks. Donaldson violated his instructions, which were to send such checks to the payees, and he was never authorized to use their name upon commercial paper. Plaintiffs were ignorant that he had so used their name until after he absconded. The declaration contained a special count alleging the foregoing facts, and a count for money

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had and received for plaintiffs' benefit. We understand that counsel for plaintiffs do not claim a recovery upon the checks, but upon the theory that the bank has received money for their use and benefit.

The facts are that Staebler & Co. had money in the bank upon deposit, and drew these checks against their account. The bank paid the checks and charged them against Staebler & Co., and in due course of business passed them to Staebler & Co., presumably on a periodical balancing of Staebler & Co.'s bank book. Apparently these things were done when both the bank and Staebler & Co. supposed that the checks had been paid to one authorized to collect them.

Counsel for the plaintiffs maintain that this was in effect a settlement of the drawer's account with the bank, after which it was in possession of a fund equitably belonging to the true owner of the checks.

Counsel for defendant rely upon three cases in alleged contravention of this claim: *First Nat. Bank of Washington* v. *Whitman*, 94 U. S. 343, and our own cases of *Brennan* v. *National Bank*, 62 Mich. 346, and *Grammel* v. *Carmer*, 55 Mich. 201. See, also, *Cincinnati, etc., R. Co.* v. *Bank*, 54 Ohio St. 60 (31 L. R. A. 653).

Under the Michigan cases cited, this court is committed to the doctrine that the holder of an unaccepted check has no right of action against the drawee, and that the check does not operate as an assignment of the amount named in it, in the drawee's hands, a doctrine supported by the Federal case mentioned. Although there is a want of harmony in the cases, those in Illinois especially indicating a different doctrine, we see no occasion to depart from the rule as heretofore settled for this State.

Neither is this a case where it can be said that plaintiffs have a cause of action for money paid to the bank for their use and benefit. The money was deposited in the bank, not to the plaintiffs' use and benefit, but for Staebler & Co. This deposit created the relation of debtor and creditor as between them, and it has never been changed

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either by an assignment of Staebler & Co.'s claim against the bank, or in any other way. See Tiffany's Justice's Guide (6th. Ed.), p. 788 et seq.; *Perley* v. *County of Muskegon*, 32 Mich. 132, 135. See, also, *Grammel* v. *Carmer*, supra, citing *Gibson* v. *Cooke*, 20 Pick. (Mass.) 15, of which it says:

"In *Gibson* v. *Cooke*, 20 Pick. (Mass.) 15, it appeared that a party had drawn a bill which was dishonored for want of funds. Afterwards the drawer remitted funds expressly to meet that and another small bill which had previously been drawn. The drawee paid the small bill, but refused to pay the other. It was held that the payee could not maintain an action against the drawee for the amount, there being no privity of contract between them. If any case could be conceived whose facts would support such an action, this must be such a case, for here the funds were remitted for the express purpose of paying the bill sued upon."

The judgment is affirmed.

MCALVAY, C. J., CARPENTER, GRANT, and MOORE, JJ., concurred.

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RANSIER v. DWYER.

1. CONTRACTS — RESCISSION — FRAUDULENT REPRESENTATIONS — FAILURE TO DECEIVE.
   Where, on a bill to rescind a contract for the sale of land on the ground of fraudulent representations, it appears that before complainant entered into the contract of purchase he had investigated and learned the falsity of every fraudulent representation alleged in his bill, only an extraordinary case will prevent denial of relief.

2. VENDOR AND PURCHASER — RESCISSION — AFFIRMANCE OF DECREE—RELIEF ON GROUND NOT ALLEGED.
   Where, on a bill to rescind a contract for the sale of land on the ground of fraudulent representations, it appears that at the time defendant entered into the contract to sell to plaintiff he had already made a binding contract to sell to another, of which fact complainant was not apprised until after the filing of his bill for rescission, a decree granting rescission will be affirmed though the making of the contract was not induced by the fraudulent representations.

Appeal from Wayne; Donovan, J. Submitted June 14, 1907. (Docket No. 60.) Decided September 20, 1907.

Bill by Bertrand W. Ransier, John Funke, and William Smith against Mary L. Dwyer, executrix of the last will and testament of John M. Dwyer, deceased, to rescind a land contract on the ground of fraud. From a decree for complainants, defendant appeals. Affirmed.

George B. Greening, for complainants.

John H. McDonald (*Edward S. Grece*, of counsel), for defendant.

CARPENTER, J. The circuit court found that a contract whereby complainants purchased from defendant's testator the hotel called "Hotel Barry," in the city of Hastings, was procured by fraud, and entered a decree for its rescission. Defendant asks us to vacate that decree.

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It appears by the testimony that before complainants entered into the contract of purchase they had by investigation learned the falsity of every fraudulent representation alleged in their bill of complaint. Under these circumstances it must be held that they were not defrauded by these representations, and if the case were not an extraordinary one, it would be our duty to reverse the decree and dismiss their suit; but the case is an extraordinary one.

It appears from the testimony that when the contract in question was made, defendant's testator had already contracted to sell said property to another, one Lura Gregory Powell, and that she, Mrs. Powell, had commenced suit in the circuit court for the county of Barry, where the property was situated, to enforce said contract. This suit resulted in a decree in favor of Mrs. Powell, which decree has just been affirmed by this court. See *Powell* v. *Dwyer*, ante, 141. Complainants had no knowledge of said contract of purchase until after they commenced this suit (and there is, therefore, no reference to the same in their bill of complaint), but their rights were subject thereto, because a proper and legal notice of lis pendens was upon file when they entered into their contract of purchase.

Under these circumstances it would be an idle ceremony to observe the rule — generally a most meritorious one — that relief will not be given upon any ground not alleged in complainants' bill. For if complainants were permitted—and it would be unjust to refuse to permit them—to file a new bill setting forth the established facts, they would be entitled to relief. No defense could possibly be made to such a bill.

The decree will, therefore, be affirmed. Defendant will recover costs in the circuit court. No costs will be awarded in this court.

McALVAY, C. J., and GRANT, HOOKER, and MOORE, JJ., concurred.

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WEBSTER v. YPSILANTI CANNING CO.

1. CORPORATIONS — INSOLVENCY — MORTGAGES — PREFERENCE — DISTRIBUTION OF ASSETS.

   Certain stockholders of a manufacturing corporation having lent it money and being about to indorse its notes at the bank to raise funds for a working capital, the board of directors, all of whom were creditors, authorized the giving of a mortgage upon all the property of the corporation to secure the stockholder creditors and indorsers. The corporation was insolvent within the rule laid down in *Munson* v. *Ellis*, 58 Mich. 331, but the annual report, subsequently made, showed assets of $11,400 and liabilities of $4,800. *Held*, that the mortgage was not invalid as given in anticipation of discontinuing the business or for the purpose of distributing the assets of a non-going concern to preferred creditors.

2. SAME — MORTGAGES — VALIDITY — PREFERENCE OF STOCKHOLDERS.

   A mortgage on the assets of a corporation is not ineffective because ordered by directors who are personally secured thereby.

3. MORTGAGES — EXECUTION CREDITORS — PRIORITY OF LIEN.

   A corporation gave a mortgage covering its real and personal property to a trustee to secure certain creditors, and thereafter an unsecured execution creditor levied on the real estate. Subsequently the trustee foreclosed the mortgage as to the real estate and bid it in for a sum sufficient to pay the entire debt, and later during the period of redemption foreclosed the mortgage as to the personal property, bid for it a sum sufficient to pay the entire debt, took the property and disposed of it. *Held*, that the execution creditor is entitled to a lien upon the real estate superior and prior to the title asserted by the trustee, and in default of payment of his debt, to the right to sell the real estate to satisfy the same.

Appeal from Washtenaw; Kinne, J. Submitted June 14, 1907. (Docket No. 17.) Decided September 20, 1907.

Bill in aid of execution by Hiram P. Webster, George W. Webster, Fred C. Cobb, Charles S. Cobb, and Miny

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E. Miller, copartners as Webster, Cobb & Co., against the Ypsilanti Canning Company and Robert W. Hemphill, trustee. From the decree rendered, complainants appeal. Reversed.

Choate & Webster and *A. J. Sawyer & Son*, for complainants.

Tracy L. Towner and *John P. Kirk*, for defendants.

OSTRANDER, J. The complainant partnership is a judgment creditor which levied upon the real estate formerly owned by defendant corporation, which real estate was, subsequent to the making of the levy, sold in foreclosure proceedings to, and is now held by, defendant Hemphill, as trustee, for those whose obligations against the company were secured by the mortgage. The mortgage, which conveyed all property, real and personal, belonging to defendant corporation, was given by sole authority of the board of directors, each of whom was a creditor of the corporation and each, with some 37 other creditor stockholders, was secured by the mortgage. No other creditors were secured. It is claimed that the mortgage was given when the defendant was insolvent, was not a going concern, and had no intention of continuing business; was intended as and was in effect a distribution of all of the assets of the corporation to its stockholders.

It appears that a canning factory was built by a Chicago concern with money subscribed for that purpose by citizens of Ypsilanti and vicinity; after which the subscribers received stock in defendant corporation, which was organized to operate the factory, to the amount of their several subscriptions. The factory was built in 1901, and was turned over to the defendant corporation in February, 1902, having cost more than $11,000. There was no money for operating expenses; there were nearly 100 stockholders. Some of the stockholders lent the concern money, taking its notes. On June 9, 1902, $1,000

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was borrowed at a bank and the note of the company, indorsed by the directors, given therefor. Prior to this transaction, and on June 6, 1902, the directors adopted the following resolution:

"*Whereas*, The Ypsilanti Canning Company is unable to procure money with which to carry on the business for the season 1902 except by individual indorsement of its paper by members of said company: *Resolved*, That the members of said company who so indorse or become liable upon the paper of said company shall have a lien in the nature of a first mortgage upon all the property and effects of the said Ypsilanti Canning Company, to save and indemnify them and each of them from all loss caused by such indorsement or liability."

From May to August, 1902, some $2,900 was raised among stockholders in addition to the $1,000 borrowed at the bank. The mortgage was executed November 21, 1902, and the condition was that the corporation pay—

"All notes given or indorsed or which shall be given or indorsed during the life of this mortgage which matures in three years from date hereof, by the said Ypsilanti Canning Company or by any one or all of its directors for and on behalf of said company, or for which said directors are jointly or individually liable, according to the terms and conditions of a certain bond bearing even date herewith executed by the said Ypsilanti Canning Company to the said party of the second part, to which this indenture is collateral security."

The bank note was paid before the mortgage was foreclosed. The mortgage was recorded February 24, 1903, and was foreclosed by advertisement in November, 1904, and the real estate bid in by the trustee for $2,327.84, which was the amount then secured thereby, with interest and costs. Complainants' debt is for lumber furnished defendant corporation in August, 1902. Judgment was rendered in justice's court March 24, 1903, and on July 8, 1903, transcript of the judgment was filed and judgment in the circuit court entered. The execution, calling for the collection of $231.15, was levied on the same day. It

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is not shown that other than honest debts, representing money advanced by stockholders to afford capital for the business, were secured by the mortgage. The argument made by counsel for complainants supports the proposition that if the mortgage had been given before or at the time the advancements were made, it could not be successfully assailed.

Bad faith cannot be, upon this record, imputed to the secured creditors, or to the directors as officers, although the intention was to give a first lien upon the property to those who had advanced money to carry on the business. The corporation was insolvent, as insolvency is defined in *Munson* v. *Ellis*, 58 Mich. 331, when the mortgage was given; but the record does not support the claim that it was then hopelessly insolvent and it does not now appear that the property owned by it was not of sufficient value to pay the debts. Whether it had ceased to be a going concern and reasonable hope of continuing the business had been abandoned, is not, perhaps, so clear. The season of 1902 was wet and exceedingly bad for the canning business. Some business was done. With this exception, the company never operated the plant. They used up the funds raised by loans from stockholders and no new plan was formulated for securing needed capital. They leased and attempted to lease the factory, but there was no income therefrom. That they were, as one of the witnesses expressed it, "all hoping, though hoping against hope," is shown by various circumstances, among which is the date of the maturity of the mortgage. The annual report of the company, made February 28, 1903, and filed in March, 1903, shows the mortgage in question, gives the value of real estate as $2,500, value of personal estate, including credits, as $8,915.61, total indebtedness, $4,812.17. Upon the whole record, we are convinced that the mortgage was not given in anticipation of discontinuing the business or for the purpose of distributing the assets of a non-going concern to preferred creditors. Unless the security was legally ineffective because ordered by direct-

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ors who were personally secured thereby, it must be held that the case is, upon this point, ruled by the principle applied in *Bank of Montreal* v. *Lumber Co.*, 90 Mich. 345; *O. W. Shipman Co.* v. *Railway*, 140 Mich. 589; *Sanford Fork & Tool Co.* v. *Howe, Brown & Co.*, 157 U. S. 312.

As to the action of the directors. We find no authority, in those jurisdictions in which the rule of *Bank of Montreal* v. *Lumber Co.*, supra, is recognized, for the proposition that the mere fact that directors are preferred by action of the corporation instituted by themselves is sufficient to invalidate the security. The case of *Rickerson Roller-Mill Co.* v. *Machine Co.*, 75 Fed. 554, 23 C. C. A. 302, relied upon by counsel for complainants, is not like the case at bar. In that case, Judge Lurton, citing and commenting on the rule of *Bank of Montreal* v. *Lumber Co.*, says:

"If such a corporation may prefer a stranger who is a creditor, it may likewise prefer one of the corporators. In the latter case, however, the utmost good faith must appear, not only in respect of the bona fides of the debt paid or secured, but in regard to all the steps taken to secure the preference. In the case before us the preference is given to persons who at the time constituted three-fourths of the directors who assented to the arrangement."

After finding that the directors had given certain assurances to the attacking creditors, the learned judge, continuing, says:

"Under such circumstances, it is not enough for directors taking a preference out of the assets of an insolvent corporation to establish the fact of the debt due to themselves. They secured the opportunity to prefer themselves by assurances that they would not do so."

The reasoning employed applied to the facts of the case before us sustains the validity of the mortgage, and we are of opinion that it was a lawful security.

But the trustee, as mere matter of form, it is said, also foreclosed the chattel mortgage. Sale was made in Feb-

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ruary, 1905. We do not know what property was covered by or sold under the chattel mortgage or the real value of it. There was some property. Manifestly, one purpose of foreclosing the chattel mortgage was to put title to the property in the trustee. He asserted title thereto. The inference drawn from the record is that this property is not now in the possession or under the control of the trustee. It, or the most of it, has disappeared. We have, then, this situation: A mortgagee whose mortgage covers real and personal property forecloses it, by advertisement, as to the real estate, and bids in the property for a sum sufficient to pay the entire debt. A judgment creditor of the mortgagor has, at the time, a lien upon the property subsequent to the mortgage lien. Later, during the period of redemption, having acquired no title to the real estate, the mortgagee forecloses his lien upon the personal property, bids for it a sum sufficient to pay the entire mortgage debt, takes possession and disposes of the property. Title to the real estate is asserted by virtue of the sheriff's deed. Thereafter, no other rights having intervened, the execution creditor, in aid of his execution and lien, seeks a decree postponing the mortgagee's title to his lien. The court below held the foreclosure of the chattel mortgage unlawful and the apparent title acquired thereby to be void, and gave no other relief.

It is clear that if the mortgagor had paid the debt or if the amount bid at the chattel-mortgage sale had been paid in cash, the execution levy would have remained a first lien on the real estate. In the absence of some controlling equity in favor of defendants, we think that as to complainants the case is not different in law from what it would be if the sale of the personal property had been for cash. Indeed, equitable considerations favor complainants, since the personal property out of which, presumably, they might have made their debt, has been dispersed by the trustee. We are of opinion that the execution creditor should be held to have a lien upon the real estate superior and prior to the title asserted by defendant Hemp-

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hill, trustee, and, in default of payment of the debt, the right to sell the real estate to satisfy the same. See *James* v. *Brown*, 11 Mich. 25.

The decree below is reversed, and a decree will be entered here in accord with the views herein expressed.

Complainants will recover costs of both courts.

CARPENTER, GRANT, and MONTGOMERY, JJ., concurred with OSTRANDER, J. BLAIR, J., concurred in the result.

NORTH MICHIGAN LAND & LIVE STOCK CO. *v.* KNEELAND.

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157 45

1. SAVING QUESTIONS FOR REVIEW—FAILURE TO EXCEPT—NECESSITY OF MOTION FOR NEW TRIAL.

Where the attorney who tried a case was disconcerted by a prompt ruling of the court, and inadvertently failed to except, and out of diffidence neglected to offer testimony which he might otherwise have offered, the matter should have been brought to the attention of the trial court by motion for a new trial in order to secure review in this court.

2. NEW TRIAL—EXCESSIVE VERDICT—EVIDENCE.

In an action of trespass for cutting timber, a new trial will not be granted, on the ground that the verdict is excessive and against the weight of the evidence, where it appears that defendant had full notice of plaintiff's claims, and, instead of keeping an account of the timber cut from plaintiff's land, intentionally mingled it with a large amount of other timber then being cut by defendant in carrying on extensive lumbering operations.

3. SAME—ABSENT WITNESS—CUMULATIVE TESTIMONY.

A new trial will not be granted because of the absence of a witness whose testimony would have been merely cumulative on the question of damages, and whose intended absence was known to counsel, if not to the party, before the trial was proceeded with.

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4. TRESPASS — TREBLE DAMAGES — LIABILITY — INSTRUCTIONS — HARMLESS ERROR.

Error in instructions on the liability of defendant for treble damages for cutting timber is harmless, where the jury relieve the defendant from liability beyond single damages.

5. NEW TRIAL — EXCESSIVE VERDICT — REDUCTION BY COURT — EFFECT.

Where, on a motion for a new trial, in an action of trespass for cutting timber, on the ground of excessiveness of the verdict, the trial court, after considering the affidavits filed in support of the motion, concludes that the verdict is excessive and orders a remittitur, a claim that he should have submitted the matter to another jury, instead of fixing the amount of damages, is not well taken, where the court did not find defendant excused for the failure to produce at the trial better evidence of the amount of timber cut.

Error to Montmorency; Emerick, J. Submitted June 17, 1907. (Docket No. 59.) Decided September 20, 1907.

Trespass quare clausum fregit by the North Michigan Land & Live Stock Company against Otis S. Kneeland. There was judgment for plaintiff, and defendant brings error. Affirmed.

Lewis P. Coumans, for appellant.

I. S. Canfield, for appellee.

OSTRANDER, J. The only contention open to appellant upon this record is the one that the court erred in refusing to grant a new trial. Other errors are assigned, based upon rulings made on the trial and upon a charge in agreement with these rulings. Counsel apparently acquiesced in the rulings made by the court. It is said in the brief:

"Perhaps it might be said that the attorney for defense instead of acquiescing in the court's determination in regard to the deed should have persisted in seeking to make additional proofs of the regularity of the proceedings previous to the deed, introducing the decree of the court,

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etc., but the terse and positive statement of the court in regard to the deed evidently stopped him from proceeding farther on that subject."

It is a sufficient answer to the argument made upon this proposition to say that if the attorney who tried the case was disconcerted by the prompt ruling of the court, and out of diffidence (these reasons are suggested in the brief) neglected to offer testimony which he might otherwise have offered, it was a matter which should have been brought to the attention of the court on the motion for a new trial. Especially is this true if the failure to except to the rulings of the court was also a matter of inadvertence. No such reason for granting a new trial was asserted.

A proper understanding of the issues may be obtained from the reasons, which are here set out, given by the circuit judge for refusing a new trial:

"This is an action of trespass, brought by the plaintiff to recover damages for the cutting and removing by defendant, of certain kinds of timber from off the southeast quarter of the southeast quarter of section 27, in township 29 north, of range 2 east, in said county.

"Upon the trial the plaintiff established a complete chain of title from the government to itself to the land in question.

"The title of the plaintiff to the land in question, at the time of cutting and removal of the timber, was conceded by the defendant.

"While the defendant held under certain conveyances of various parties to the timber in question, it was admitted that these conveyances were all invalid, and that the defendant had no legal title to enter upon the land or cut and remove the timber therefrom.

"Two questions were litigated upon the trial:

"*First*, the amount and value of the timber actually cut and removed from the land by the defendant; and

"*Second*, whether the defendant cut and removed such timber under such circumstances as would render him liable for treble damages therefor, under the statute in such case made and provided.

"The trial at the last May term of this court resulted

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in a verdict for the plaintiff for the sum of $1,505.80 for single damages, upon which judgment was entered for the plaintiff.

"The defendant has moved for a new trial upon various grounds, which may be reduced to the following:

"Because the verdict is against the weight of evidence and is excessive in amount.

"Because of newly discovered evidence, and because the defendant was unable, upon the trial, to procure the attendance of one George H. Cross as a witness, and

"Because the court erred in certain particulars in charging the jury.

"After a careful consideration of the affidavits submitted upon both sides and the showing made upon such motion, the court came to the conclusion that the verdict was excessive in amount, and entered an order that unless the plaintiff filed its consent in writing that the verdict be reduced to the sum of $1,000, and remitting the sum of $505.80 in excess thereof, the defendant would be granted a new trial.

"Such consent was then duly filed in the case, and the judgment now stands in favor of the plaintiff for the sum of $1,000.

"Before any of the timber was cut or removed by the defendant he had ample and repeated notice from the plaintiff that it was the owner of the land in question, and that, if any timber was cut and removed from the same by the defendant, he would be held responsible therefor in an action at law.

"Under these circumstances, the least he could do, in justice to the plaintiff and the court, would have been to have kept an accurate account of the timber thereafter cut and removed by him from the land in question and the market value and prices obtained therefor by him.

"Nothing of the kind was done, but the timber was apparently intentionally mingled with a large amount of other timber, then being cut and put in by the defendant in carrying on his extensive lumbering operations.

"I do not think that the presence of the witness, George H. Cross, would have changed the result in any particular. His testimony would have been purely cumulative to that of the plaintiff as to the amount of timber upon the land in question before any was cut by the defendant. It would have amounted, at the most, to his estimate of what timber was standing upon the land at the

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time it was purchased by the defendant, and also of the amount of timber which had been cut off therefrom at some earlier period or periods.

"And, again, while the defendant may not have known that Mr. Cross would not be present at the trial at the time the jury was sworn, his counsel did know before the trial was proceeded with that he would not be present at the trial, and voluntarily elected to proceed therewith in the absence of this witness.

"The verdict and judgment, as reduced by the court, in my opinion is not excessive.

"All the errors of the court, in charging the jury, which are set up in the motion for a new trial, relate to the manner of submitting the question to the jury of the liability of defendant for three times the value of the timber cut and removed by him. This question was determined by the jury in defendant's favor, and if any errors were committed by the court therein, they are now of no importance."

We find no reason for disturbing these conclusions. The point is made that the court, after considering the affidavits filed in support of the motion, found the verdict excessive and should therefore have submitted the matter to a new jury instead of fixing the amount of the damages. The court did not find the defendant excused for the failure to produce at the trial better evidence of the amount of timber cut and removed. See *Canfield* v. *City of Jackson*, 112 Mich. 120.

The judgment is affirmed.

BLAIR, MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

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HULL *v.* HULL.

1. WILLS — CONTRACT BETWEEN EXECUTOR AND LEGATEE — CANCELLATION — UNDUE INFLUENCE.

   On a bill by an executrix and legatee against her co-executor to cancel a contract between them by which the entire management of the estate was to be given to defendant and complainant was to accept a specified sum per year in lieu of the provision for her support contained in the will, evidence examined, and *held*, that complainant failed entirely to support her contention that she was deceived or misled or did not understand the contract when she signed it.

2. SAME — VALIDITY OF CONTRACT.

   A will provided that testator's widow should receive the entire income of the estate and such further sum from the principal as should be agreed upon by the executors or ordered by the court, as her necessities might require, and appointed the widow and a nephew executrix and executor. By a contract consented to in writing by all others interested in the estate, it was agreed that the executrix should have a stipulated sum annually and an additional allowance if her necessities required it in lieu of the provision for her support contained in the will, and that the executor should have the entire management of the estate. *Held*, that the contract was a fair contract, and that it was competent for the parties to enter into it.

3. SAME — ALLOWANCES TO LEGATEE — CONSTRUCTION.

   The provision for an additional allowance, in case her "actual necessities" should require it, has reference to the necessities for support and comfort provided for in the will, and does not invalidate the agreement as depriving the legatee of rights given her by the will.

4. COURTS — JURISDICTION — CONFERRING BY CONSENT — PROBATE COURTS.

   A contract between a legatee, for whom provision for support was made by the will, and the executor, under which the legatee agrees to accept, in lieu of the provision for support, an annual allowance, and such further sum in case of actual necessity as the probate court should allow, is invalid as to the provision respecting application to the court, since the

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court would not have jurisdiction independent of the contract, and consent cannot confer jurisdiction of the subject-matter.

Appeal from Eaton; Smith, J. Submitted June 18, 1907. (Docket No. 58.) Decided September 20, 1907.

Bill by Margaret A. Hull against John Hull, executor of the last will and testament of Tyler Hull, deceased, to set aside a contract on the ground of fraud. From a decree dismissing the bill, complainant appeals. Modified and affirmed.

Black, Reasoner & Hayden and *S. B. Roe*, for complainant.

Huggett & McPeek, for defendant.

BLAIR, J. Complainant and defendant are joint executors of the last will and testament of Tyler Hull, deceased. The will was construed, upon a bill of complaint filed by the above-named complainant for that purpose, in *Hull* v. *Hull*, 122 Mich. 338. After that decision, and on July 25, 1901, "Margaret A. Hull, as executrix named in the last will and testament of Tyler Hull, deceased, and as a legatee named in said will, as party of the first part, and John Hull as executor named in said will, of the second part," entered into an agreement in writing reciting that:

"Whereas by the terms of said will of Tyler Hull, deceased, the said party of the first part as a legatee named therein, is to receive the income of said estate and such further sum to be paid out of the principal of said estate as may be agreed to by the said executors or ordered by the court, as her necessities may require, for the purpose of saving expense to said estate, this agreement is made."

The agreement provided, in substance, that the executor John Hull should "perform the entire work as executor of said estate for the sum of two hundred dollars per an-

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num;" that the executrix should surrender the entire management to her co-executor and continue as a nominal executrix, her bond being reduced to the sum of $1,000, and she to receive no compensation as executrix—

"That said Margaret A. Hull shall have and receive from the said estate the sum of one thousand dollars per annum to be paid to her by the executor of said estate as the income thereof, the same to be paid to her quarter yearly, the first payment to be made three months from the date this contract takes effect, and up to the date this contract takes effect she is to have the income of said estate to be ascertained and paid to her, that such quarter yearly payments of two hundred and fifty dollars each, together with the use of the dwelling house and premises and the personal property now in use therewith shall be in lieu of all her interest as legatee named in said will, provided, however, that in case her actual necessities by reason of ill health or otherwise shall necessitate a greater sum shall be paid to her, the said Margaret A. Hull shall have the right to apply to the probate court for such additional allowance as may be necessary without in any way invalidating the other provisions of this contract."

That all taxes should be paid by the estate, but Mrs. Hull should pay for real estate repairs. The agreement was also signed by the other legatees.

The primary purpose of the bill of complaint in the present suit is to set aside this agreement. The specific prayers for relief are as follows:

"2. That the court may assume jurisdiction of the rights and claim of your oratrix as above set forth, and determine whether said agreement, Exhibit B, should be binding on your oratrix, and

"3. That the court may decree the same void and of no effect; and that it be canceled.

"4. That the defendant may be decreed at once to pay to your oratrix out of said estate the sum of about four hundred dollars and thereafter to make quarterly payments of three hundred and seventy-five dollars each quarter, or such sums as to the court may seem just, at the time and place required in said contract or agreement described herein as Exhibit B, and in lieu of the payments therein mentioned."

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The parties had acted under the agreement for nearly five years prior to the filing of the bill of complaint.

The reasons set up for invalidating the agreement, as stated in the bill, are, in substance, that, at the time she signed it, she was in a state of nervous collapse and in ill health and was unable to and did not understand the import and effect of the agreement; her attorney falsely represented to her "that the judge of probate of said county of Eaton, under whose direction and supervision your oratrix had been administering said estate, had directed that she sign said instrument and that it was necessary and advisable for her to do so;" that the provision that she should surrender the management and not interfere with the assets of the estate was against public policy; that no consideration has been paid to which she would not have been entitled under the terms of the will.

The circuit judge dismissed the bill of complaint for the reason, as stated in his opinion:

"That the disposition of this case hinges upon what the court finds as to the fact regarding the execution of the contract which she seeks to set aside and have the court declare void. That if she is not entitled to have this done, this court has no jurisdiction to give to her the relief she asks regarding an increase of her allowance but that her remedy is to apply to the probate court under the contract for additional allowance.

"I do not think any good purpose will be served in a discussion of the evidence taken. It is sufficient to say in disposing of the case that I am of the opinion she has failed entirely to support her contention that she was deceived or misled, or did not understand this contract which she signed. I am of the opinion that at the time she fully understood it and knew what she was doing and was in no way coerced or deceived."

Complainant appeals to this court.

The questions involved are stated by counsel for appellant, as follows:

"The principal question raised by the pleadings and proofs is whether or not the complainant is entitled to a greater allowance than she has been receiving. This

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question it is claimed does not depend on the validity of the contract referred to as Exhibit B. Incidentally, another question involved is, whether or not the contract, Exhibit B, should be held to bind the complainant, the claim of the complainant's solicitors being that it should not be held to limit her, for the following reasons:

"*First.* Because her consent was, owing to her illness and consequent mental incapacity, never obtained in a manner which would constitute a valid meeting of minds.

"*Second.* Because the contract being between a trustee and the cestui que trust, and the trustee being interested as a legatee under the will in the subject-matter concerning which the contract was made and since he receives an advantage from it, the contract, except in so far as it was required by the terms of the trust, is invalid, because it is not fair or conducive to the best interests of Mrs. Hull.

"*Third.* Because the agreement was wholly without consideration."

We agree with the circuit judge that the primary question presented by the pleadings and proofs concerns the validity of the agreement, and we also agree with him in the finding that "she has failed entirely to support her contention that she was deceived or misled or did not understand this contract which she signed."

We are satisfied, after a careful consideration of the testimony, that complainant's attorneys acted in good faith in advising her to sign the contract, and that, as a matter of fact, she acted wisely in following their advice. At the time the contract was executed, and for a considerable time prior thereto, the relations between complainant and defendant were unfriendly, and, because of their inability to agree, several thousands of dollars had been expended in litigation over the construction of the will and the settlement of their respective accounts. As complainant testified, "We never agreed on anything." Under the will, it was essential that the executors should agree, and, in view of the hostile relations between them, they acted prudently in entering into the agreement in question "for the purpose of saving expense to said

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estate," if the law permitted such a contract to be made.

In determining the validity of this agreement, it is important to bear in mind that its execution by complainant and defendant was consented to in writing and bore the signatures of all the other parties interested in the estate under the will and who were all competent to contract. The apparent purpose of the agreement is not to overturn the will or radically change its provisions but to make definite, so far as possible, the provision for complainant's comfortable support, which, under the will, would probably vary from year to year and might be seriously impaired by litigation reasonably certain to arise between the executors. It is conceded by counsel for complainant, and the record clearly indicates, that a diminution of the principal of the estate is reasonably certain and the principal may be entirely exhausted before the death of complainant, though this is, perhaps, not probable. It may, however, be reasonably anticipated that the income will fall considerably short of $1,000 a year, since it is now necessary to use a portion of the principal, and contingencies may arise to diminish the principal. Under the contract, however, the complainant is assured of $1,000 a year and her home and its personal property to the end of her life, although the entire income-producing estate may be exhausted. It is further to be considered that the will contemplated the comfortable support of complainant during her natural life, and in determining the amount needed for such comfortable support, some reference must be had to the probable duration of her life.

It is further urged that the contract limits complainant's right to further allowances to cases of actual necessity. Whether such limitation would invalidate the contract, we need not determine, since we are of the opinion that the provision relative to "her actual necessities," contained in the fifth clause of the contract, should be construed to refer to the same necessities mentioned in the recital of the first clause, being the necessities for support and comfort provided for in the will.

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In view of all the circumstances, the unfriendly relations of the parties, and that there were no creditors interested, we think the contract was a fair contract, whose enforcement will be much more for the benefit of the parties than its cancellation, and, apart from the provision hereafter referred to, that it was competent for the parties to enter into it. *Foote* v. *Foote*, 61 Mich. 181; *Letts* v. *Letts*, 73 Mich. 138; *Bean* v. *Bean*, 144 Mich. 599.

It is also contended that the probate court has no jurisdiction to determine the needs of complainant and the provision giving such jurisdiction invalidates the contract. We are of the opinion that this contention is well founded and must prevail. Independent of the contract, the probate court would not have jurisdiction. *Knorr* v. *Millard*, 52 Mich. 542; *Hull* v. *Hull*, 122 Mich. 338. And jurisdiction of the subject-matter cannot be waived nor conferred by consent. 11 Cyc. pp. 673, 697; *Kirkwood* v. *Hoxie*, 95 Mich. 62; *Hagar* v. *Coup*, 50 Mich. 54.

We think that the allowance of $1,000 a year, payable quarterly, as provided in the contract, is a reasonable and proper allowance, but, in addition thereto, complainant will be allowed the amounts expended or agreed to be paid for putting in the furnace, reconstructing the tenant house, erecting the wind-mill, digging the drain and introducing the water system into the house, which improvements we think were reasonably necessary for her comfort. If the parties cannot agree as to the amounts to be so allowed for the improvements, a reference may be had to a circuit court commissioner to determine the same.

A decree may be entered in accordance with this opinion, with costs of this court to complainant.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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ROBERTS v. FIRST NATIONAL BANK OF YALE.

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1. TRIAL—DIRECTION OF VERDICT—PROPRIETY.
   Where, after a ruling that there is no basis for the damages claimed by the first two counts of a declaration, plaintiff abandons the remaining count, the ruling disposes of the case and a verdict for defendant is properly directed.

2. PRINCIPAL AND SURETY—RIGHTS OF SURETY—ACTION AGAINST CREDITOR—DECLARATION.
   In an action by the indorser against the indorsee of a promissory note, a declaration alleging in the first count that defendant allowed a chattel mortgage securing the note to lapse, and in enforcing its judgment against plaintiff upon the note caused him great damage by levy upon his lands, and in the second count that defendant represented to plaintiff that the note had been paid, inducing plaintiff to give no further attention to the mortgage security but to allow it to lapse, resulting likewise in damage from defendant's levy, sets out no cause of action based on the duty of the defendant to enforce the mortgage security for plaintiff's benefit.

3. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE—SURPRISE—SUFFICIENCY OF SHOWING.
   A motion for a new trial on the ground of newly-discovered evidence showed that plaintiff made unsuccessful inquiries to discover the desired evidence and that he was misled concerning the testimony which one witness would give, in that upon close inquiry it was found he knew the facts only from hearsay. The witness was not sworn, the inference being that his want of knowledge was discovered before or during the trial. *Held*, that though the showing of diligence might have influenced the court to grant a continuance, and the showing of surprise might have secured an order permitting a voluntary nonsuit with leave to set the same aside, neither showing appeals to a court of review on an application to reverse an order denying a new trial.

Error to Sanilac; Beach, J. Submitted June 18, 1907. (Docket No. 61.) Decided September 20, 1907.

Case by William Roberts against the First National

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Bank of Yale for fraud. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

It is the claim of the plaintiff that, being himself the owner of a certain note, made by Robert S. Hesson and Susie E. Hesson, his wife, payment of which was secured by a chattel mortgage on household and other goods, he sold the note to the defendant through its agent, W. W. Lord, and at Lord's suggestion that the bank form of note was desired, procured the makers to make a new note upon such a form, corresponding in all respects to the old note except that defendant was named as payee therein. The note, produced in evidence, is dated December 31, 1901, due in one year, with interest at 7 per cent. It contains no reference to a chattel mortgage. It is indorsed by plaintiff and by Lord. The makers of the note also executed a new chattel mortgage, running to B. R. Noble, who was president of defendant bank. The note was paid for by Lord's check on the defendant bank. The chattel mortgage was filed in the office of the clerk of the township of the makers' residence by plaintiff. Plaintiff was sued upon this note by the defendant and he paid, after levy had been made upon his real estate, the judgment which was rendered against him thereon.

Plaintiff's declaration contains two counts. A third count was abandoned at the trial. The averments in the first count present the theory that upon receiving the said note, indorsed by plaintiff, it became the duty of defendant to preserve and later to exhaust the chattel-mortgage security before enforcing the liability of the indorser. It is charged that defendant negligently and carelessly permitted the mortgage security to lapse and be lost, and in enforcing its said judgment against the plaintiff by levy upon his lands—

"Plaintiff lost the sale of certain and divers village lots and other parcels of his said lands, and thereby the said

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plaintiff was deprived of and lost certain large gains and profits, which he, the said plaintiff, would otherwise have had, * * * and thereby the said plaintiff was greatly damaged in his property and estate, to wit, in the sum of three hundred dollars."

In the second count, it is charged that defendant falsely and fraudulently represented to the plaintiff that the note had been paid by the makers and, relying upon said statement, plaintiff was induced to give no further attention to the payment of the note and allowed the chattel mortgage to lapse and become worthless, after which defendant brought suit on the said note, obtained judgment, took a transcript judgment, levied execution on plaintiff's lands, and required plaintiff to pay the said judgment with costs in order to relieve his lands of the levy; that by reason of the recording of the levy plaintiff lost the sale of certain lands and gains and profits which otherwise he would have made and was "wronged and damaged in his property and estate in a large sum, to wit, the sum of $300."

A verdict for defendant was directed by the court and a motion for a new trial was denied.

H. O. Babcock and *W. H. Burgess*, for appellant.

C. F. Gates, for appellee.

OSTRANDER, J. (*after stating the facts*). The testimony introduced on the part of plaintiff tended to prove that Lord was agent for defendant and acted in that capacity in buying the note; that plaintiff was sued as indorser of the note, by defendant, a judgment recovered, a transcript judgment entered and levy made; that he paid to the sheriff the amount of the judgment and costs. There was no testimony tending to prove the value of the mortgaged property or the disposition made of it. The defendant bank claimed, and testimony offered in its behalf tended to prove, that it never had knowledge of the chattel mortgage and was not chargeable with the knowl-

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edge possessed by Lord because Lord was not its agent in purchasing the note; that it bought the note of Lord in the regular course of business with notice of no facts affecting it except such as were disclosed by the note itself. As to the claim of damage resulting from the levy, the court said:

"I think I will dispose of that phase of damages. * * * As a matter of damage the plaintiff could have relieved himself of it at any time, and this matter sued on in this case was available as a defense in the original case. There is no basis for damages."

To this ruling, an exception was taken and upon the exception error is assigned. The subject is not referred to in the brief. After this ruling had been made, counsel for plaintiff abandoned the last count of the declaration, which was in trover for conversion of the mortgaged property. Therefore, the ruling disposed of the case which plaintiff made and it was repeated, and properly so, in directing a verdict. If it is assumed that it was the duty of defendant either to preserve or to enforce for the sureties on the note the security which it held for payment of the note, that if it did neither it is liable to plaintiff, the surety who, after judgment, paid the debt, for the value of such security, and that it is open to plaintiff in a suit brought by him against defendant to assert such liability, the first two counts of the declaration set out no such cause of action.

The reasons asserted as grounds for a new trial were that since the trial the plaintiff had discovered new evidence "which will lead to a different result in said cause," and, surprise at the testimony given by a certain witness. The evidence said to be newly discovered relates to the value of the mortgaged property, to the disposal of it by the mortgagors, and to the agency of Lord. A new trial was refused because the evidence was obtainable for the trial, by diligence, and because upon the whole of the evidence the case was a doubtful one at law. Upon the subject of diligence, it is said in the brief that plaintiff, as

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his affidavit shows, made three trips and many inquiries to discover evidence of the value and disposition of the mortgaged property, and could not obtain it; that he was misled concerning the testimony which one of his witnesses would give. It is also said that upon close inquiry of this witness it was found that he did not know the alleged facts except from hearsay. It does not appear that this witness was sworn, the inference being that his want of knowledge was discovered before the trial began or during the trial. The trial was begun January 16, 1906. Early in March of the same year, the affidavits relied upon were procured. The showing of diligence now made might have influenced the court to grant a continuance, if one had been asked for, and the showing of surprise might have secured an order permitting a voluntary nonsuit with leave to set the same aside, but neither showing appeals to a court of review on an application to reverse an order refusing a new trial.

The judgment is affirmed.

BLAIR, MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

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PRESTON *v.* NEWCOMB.

1. JUDGMENT—BANKRUPTCY—CONCLUSIVENESS OF PROCEEDINGS—COLLATERAL ATTACK.

   The title of a purchaser at a bankruptcy sale is conclusive against collateral attack in any other court or proceedings and cannot be avoided by showing in another court that the purchaser really took title as trustee for the bankrupt and not as a good faith purchaser.

2. SAME—PERSONS CONCLUDED.

   A creditor of a bankrupt, who was a party to the bankruptcy proceedings, and recognized the validity thereof and the discharge of his claim, and accepted a note to revive his claim after the sale in bankruptcy was held, cannot question the title of a purchaser at the sale.

3. SAME—SUBSEQUENT CREDITORS.

   A creditor who becomes such after the conclusion of bankruptcy proceedings against his debtor cannot question the validity of the sale in bankruptcy nor the title of a purchaser at such sale.

4. ATTACHMENT—ISSUES—TITLE TO PROPERTY—EVIDENCE—SUFFICIENCY.

   Where the claimant of property, attached in the possession of plaintiff's debtor, proves title by purchase at a sale in bankruptcy proceedings against the debtor, and proves by a written agreement, the execution of which is not controverted, that the debtor had possession of the property in recognition of that title, he is prima facie entitled to the property, in the absence of evidence that he parted with the title after he acquired it.

5. SAME—EVIDENCE—ADMISSIONS—COMPETENCY.

   On the issue of the ownership of property attached in the hands of plaintiff's debtor, statements of the debtor as to the title to that and other property and as to the validity of the claims of the claimant, not made in the presence of the claimant nor brought to his knowledge, are not competent.

Error to Ionia; Davis, J. Submitted June 18, 1907. (Docket No. 114.) Decided September 20, 1907.

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Assumpsit by Thad B. Preston against Cassius C. Newcomb and Herbert B. Webber for the amount of certain bonds. There was judgment for plaintiff, and defendants bring error. Reversed.

A. A. Ellis, for appellants.

R. A. & W. E. Hawley, for appellee.

BLAIR, J. This is an action on two bonds given March 10, 1904, under section 733, 1 Comp. Laws, by the defendant Newcomb, as principal, and defendant Webber, as surety, to procure the release of a horse which had been seized upon two separate writs of attachment issued out of justice's court. One of the attachment suits was begun by the plaintiff, Preston, against Joseph T. Webber, the other by the Michigan Clothing Company against the same defendant, both of which suits proceeded to judgment. The condition in each bond was that—

"If in a suit to be brought on this obligation within three months from the date hereof the said Cassius C. Newcomb shall establish that he was the owner of the said above goods and chattels at the time of said seizure; and in case of his failure to do so if the said Cassius C. Newcomb shall pay the value of such goods and chattels with interest to the said plaintiff, then this obligation to be void," etc.

Prior to the institution of this suit, the bond to the Michigan Clothing Company was assigned to the plaintiff, Preston.

The defendants waived the plea of the general issue and claimed the benefit of Cir. Ct. Rule 24 in the opening and closing and the introduction of testimony in the cause. Defendants claimed title to the horse under and by virtue of certain bankruptcy proceedings against Joseph T. Webber in the United States district court for the western district of Michigan, resulting in the final discharge of the bankrupt on February 10, 1903. Upon a regular

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sale of the bankrupt's effects, the horse in question was sold to and, on September 8, 1902, regularly conveyed by bill of sale to the defendant Newcomb, "subject to the encumbrances running to C. C. Newcomb and S. W. Webber & Co."

The indebtedness of Joseph T. Webber to Preston, which was the basis of his attachment suit, was released by Webber's discharge in the bankruptcy proceedings, but was afterwards revived by Webber giving his note therefor, upon which the judgment was rendered. The indebtedness of the bankrupt to the Michigan Clothing Company, upon which its judgment in the attachment cause was based, was incurred after his discharge.

Defendant Newcomb, after proving the bankruptcy proceedings, among other things, put in evidence a written agreement dated September 11, 1902, and signed by C. C. Newcomb and Joe T. Webber, whereby it was agreed that said Webber, on certain terms and conditions, should look after and care for the horse, and the horse was attached in his possession.

The plaintiff put in evidence, against numerous objections, tending to show that no indebtedness really existed between Joseph T. Webber and Newcomb but that Newcomb's notes and mortgages were fraudulent and intended as a cover to protect Webber and he really purchased at the sale in bankruptcy as a trustee for Webber and not as a purchaser in good faith. It was conceded that the decree in bankruptcy could not be questioned, but plaintiff claimed and was granted the right—

"Not only to show what the facts were so far as the possession and handling of the property sold at bankrupt sale to Newcomb subsequent to said sale was concerned, but also to examine into the real bona fides of the alleged indebtedness from Webber to Newcomb under the note and chattel mortgages involved in this cause, not for the purpose of attacking the bankrupt sale but as bearing upon the relations between Webber and Newcomb and as shedding a flood of light upon the dealings between Webber and Newcomb subsequent to said sale."

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The court charged the jury, among other things, as follows:

"This court has no power or right to set aside that sale, even if it should discover that fraud had taken place. But if you should discover that there was any fraud, or that the property was disposed of to Newcomb and he taking it in trust for the benefit of Webber, that is a circumstance you may take into consideration together with all the other facts in the case in order to determine whether a year and a half later, in March, 1904, the title was really in him in good faith, or whether he was holding it in trust and the real title in Webber—the property being in his possession—whether it was for the benefit of Webber or not that may be taken as a circumstance."

Plaintiff's counsel were also permitted to show, against defendants' objections, the conduct and statements of Webber, after the sale of the horse, as to the stock of goods and other property as to which there was no evidence that defendant Newcomb had any knowledge whatever. The jury, having found a verdict in favor of plaintiff, defendants have removed the record to this court for review upon numerous assignments of errors.

We are of the opinion that the court erred in permitting evidence to be introduced tending to show fraud in the purchase of the horse at the sale in bankruptcy and that defendant Newcomb really took title as a trustee for Webber and not as a good faith purchaser.

"An adjudication in bankruptcy partakes in part of the nature of a judgment in rem, and in part of the nature of a judgment in personam. With regard to the estate of the bankrupt debtor, which has been by the court's warrant of seizure, or by the surrender of the debtor, brought within the possession and jurisdiction of the court, its orders, decrees and judgments as to the right and title to the property, or as to the disposition of it among the parties interested, are binding upon all persons and in every court. As a determination of the legal status of the bankrupt, or of the relations of the creditors to both, its judgment is conclusive in all courts where it is pleaded." *Abendroth* v. *Van Dolsen*, 131 U. S. 66.

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See, also, *Michaels* v. *Post*, 21 Wall. (U. S.) 398; *Sloan* v. *Lewis*, 22 Wall. (U. S.) 157; *Benedict* v. *Smith*, 48 Mich. 593.

The decree of the Federal court was treated by court and counsel as conclusive of the title of Newcomb to the horse under the bill of sale as against collateral attack in any other court or proceedings, but it was sought to avoid the effect of the bankruptcy proceedings by showing that Newcomb's title was obtained by fraud and in reality was not what the record declared it to be. The plaintiff, Preston, was a party to the bankruptcy proceedings and, as to his individual indebtedness, was bound by the adjudication in those proceedings. Furthermore, he recognized the validity of the proceedings and the discharge of his claim and took a note to revive the same after the title to the horse had passed to Newcomb. The indebtedness of the Michigan Clothing Company having entirely accrued after the conclusion of the bankruptcy proceedings, no pre-existing right of such company was affected by the adjudication, and it, therefore, is not in position to call it in question.

Defendant showed an unassailable title, in the first instance, under the bankruptcy proceedings. He further showed, by written agreement, the execution of which was not controverted, that Webber held the horse in recognition of his ownership, and until this showing was met by evidence tending to prove that he had parted with his title after he acquired it, he had sustained the burden of proof upon his part and was entitled to the horse.

Statements of Joseph T. Webber, as to the title to the horse or other property or the validity of defendant's claims, not made in the presence of defendant or brought to his knowledge, were not competent and should not have been received in evidence.

Judgment reversed, and a new trial granted.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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GILLETT v. MASER.

SPECIFIC PERFORMANCE—ORAL CONTRACT TO CONVEY — EVIDENCE —SUFFICIENCY.

On a bill for specific performance of an oral contract to convey land in consideration of complainant's agreement to move upon one of the parcels of land involved and furnish board and lodging for defendants' testator, evidence examined, and *held*, not to show the making of the alleged agreement.

Appeal from Ingham; Wiest, J. Submitted June 18, 1907. (Docket No. 108.) Decided September 20, 1907.

Bill by Clara Gillett and Charles Gillett against John J. Maser, executor of the last will and testament of William S. Allen, deceased, and others, for the specific performance of a land contract. From a decree dismissing the bill, complainants appeal. Affirmed.

L. B. Gardner, for complainants.

Charles F. Hammond (*Jason E. Nichols*, of counsel), for defendants.

HOOKER, J. Complainants' bill prays the specific performance of an alleged oral contract for the conveyance of real estate, in consideration of complainants' agreement to move upon one of the two parcels of land involved, and furnish board and lodging for one W. S. Allen, the owner, during the remaining years of his life.

The case is purely one of fact, and the controlling question relates to the terms of the agreement, under which the complainants moved upon the premises and rendered service for Mr. Allen. It is unnecessary to discuss the testimony at great length. The complainants' mouth is closed by the statute, and there is no positive evidence of

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the transaction. Mrs. Gilbert's children testify to admissions made by Allen, tending to show the terms of the agreement to have been as claimed by the complainants, while acquaintances of the parties relate conversations corroborative of such claim. The former are shaken by some inconsistencies, while the latter are consistent with another version. But the conduct of the complainant and her husband, both before and after Allen's death, is out of harmony with the claim now made, and we are convinced that the agreement alleged was not made, although we incline to the opinion that the deceased at times contemplated, if he did not intend, to give the property to the complainants at his death. This result was reached by the careful judge who tried the cause below, and who saw and heard the witnesses, which increases our confidence in the correctness of our conclusion.

The decree is affirmed, with costs.

BLAIR, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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KEELEY INSTITUTE COMPANY OF WEST MICHIGAN v. SHAW.

1. LANDLORD AND TENANT — LEASE—ASSIGNMENT — RIGHT TO REPAIRS.
   Where a lessee, by agreement separate from the lease, has a right to have made certain repairs and improvements, such right may pass by parol to an assignee of the lease, provided such be the intent of the parties to the assignment.

2. SAME—FAILURE TO REPAIR—ACTION—EVIDENCE.
   In an action by the assignee of a lease against the lessor for damages for failure to repair as agreed with the lessee by an agreement separate from the lease, the transaction between the lessee and the assignee is competent to show whether the rights to have repairs made were included, and it is immaterial whether the lessor was present, or a party to that bargain, she having consented to the transfer of the lease.

3. SAME—AGREEMENT TO REPAIR—PERFORMANCE—EFFECT.
   Where an agreement of a lessor to repair and improve has been performed and performance accepted by the lessee, there is no further claim and no right to repairs passes to an assignee of the lease.

4. SAME—ACTION—DECLARATION.
   Where a lessee of premises had a right by agreement separate from the lease to have performed certain repairs and improvements, and plaintiff acquired those rights by parol at the time of taking an assignment of the lease, a declaration alleging that plaintiff acquired such right by the assignment of the lease should not be so strictly construed as to exclude proof of the parol transfer.

5. SAME—RIGHT TO REPAIRS—ASSIGNMENT OF LEASE—EFFECT.
   Where a lessee has, by an agreement separate from the lease, a right to have made certain repairs and improvements, such right does not pass by an ordinary assignment of the lease, but may pass by agreement, and an instruction that all the rights of the lessee passed by the assignment whether such was the intention of the parties or not, is erroneous.

6. SAME—CONTRACT FOR REPAIRS—MERGER IN LEASE.
   A contract by a landlord to make certain repairs and improve-

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ments upon the leased premises does not merge in the lease subsequently executed, where the lease does not contain the substance of the contract for repairs, nor refer to it in any way.

7. SAME—SEPARATE AGREEMENT—RIGHTS OF ASSIGNEE.

Though an agreement to repair not contained in the lease is a separate collateral agreement, which does not run with the land, the whole transaction between the lessee and his assignee may be considered on the question of the transfer of the right to repairs, under the rule that where several instruments are made between the same parties at the same time they form one entire contract and are to be construed together as one transaction.

Error to Kent; Perkins, J. Submitted June 19, 1907. (Docket No. 70.) Decided September 20, 1907.

Assumpsit by the Keeley Institute Company of West Michigan against Louise B. Shaw for breach of contract to repair. There was judgment for plaintiff, and defendant brings error. Reversed.

Butterfield & Keeney, for appellant.

Carroll & Nichols (*George E. Nichols*, of counsel), for appellee.

HOOKER, J. The defendant, being the owner of a building, had negotiations, through her agents, with one Pritchard, regarding the leasing of the same to him, to be used as a "gold cure" establishment, or sanitarium. The negotiations were through correspondence, and on August 15, 1900, Tuttle Bros., defendant's agents, wrote to Pritchard that if he would take a lease of the premises for three years, with the privilege of two years more, at a rental stated, the defendant would make certain specified repairs and improvements to the premises. August 25th, Mr. Pritchard answered stating terms upon which he would take such lease. It was a substantial acceptance of Tuttle Bros.' offer, except that it fixed a definite time for the commencement of the lease, and

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specified in more detail the repairs and improvements to be made. Thereupon the defendant authorized her agents to contract for such repairs and improvements, and a lease in duplicate, signed by them in her behalf, was sent to Pritchard, with notice of her acceptance of his offer, who executed and returned one or both copies of the lease. It was an ordinary lease, in which no mention was made of the agreement underlying it, upon which the lessee's consent to accept the lease was based. Rent began October 1, 1900. The work was contracted for by defendant, and much of it was done.

Pritchard conducted the business contemplated until about January 19, 1901, when the plaintiff corporation was organized to take the business, in consequence of negotiations with Pritchard, which had resulted in an agreement to transfer his interest in the business and to assign his lease. This arrangement was carried out. The assignment of the lease was as follows: "I hereby assign this lease to the Keeley Institute Company of West Michigan." It was upon the back of the lease, upon which the defendant placed her consent to the transfer, and plaintiff placed its acceptance of the terms of said consent.

All of the correspondence leading up to the making of the lease was delivered with the lease to the plaintiff's organizers during the negotiations with Pritchard, and there is testimony tending to show that they acquired all the rights to repairs, etc., that Pritchard had at that time. Plaintiff remained upon the premises during the remainder of the three years, and elected to extend the lease according to its terms. A controversy arose over the question of defendant's further obligation to make repairs, which culminated in the bringing of this action for damages, in which plaintiff recovered a judgment for $1,290, and defendant has appealed.

Among other claims of the defendant, it is asserted by counsel, that,—

1. This agreement to repair was no part of the lease,

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and rights under such agreement did not pass with the lease by virtue of the assignment, but remained in Pritchard, if there were any such rights remaining. Therefore there was no privity between the parties, and a verdict should have been directed for the defendant upon that ground.

2. That prior to the assignment of the lease defendant had substantially performed her promise, by making the repairs, etc., agreed upon, that she had varied them in some particulars, but that this was upon the request of Pritchard, who accepted all of such as were made, as satisfactory. Pritchard so testifies, and further that all were completed, except the veranda and the sodding of the lawn, which the parties agreed before signing the lease should be put off until the following spring. This work was afterwards done.

Counsel say that these facts appear by the uncontradicted testimony of Pritchard and others, and that the plaintiff therefore acquired no rights under the agreement to repair, except as to the veranda and yard work which was performed, and therefore the court should have directed a verdict for defendant.

3. There are many questions arising upon rulings, which need not be stated here.

If it be conceded that the preliminary contract was separate from the lease of the premises, no one claims that it was any the less binding, or that rights under it could not be acquired in it by the plaintiff, without so providing in the assignment of the lease. As in the case of the first transaction, the second involved more than the assignment of the lease. The right to carry on the business in western Michigan was included. How that was transferred from Pritchard we need not inquire. Its transfer, like the assignment of the lease, was an incident in the performance of the agreement. We understand that defendant's counsel do not claim that failure to include said contract in the assignment of the lease is conclusive of the question, except as it is coupled with the

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claim that there was no other evidence of such transfer, and perhaps could not be, under the terms of the declaration, which is said to allege that it passed by that assignment.

We are of the opinion that rights under that contract, if there were any remaining in Pritchard, might pass by parol, if such were the intention of the parties, and that there is testimony in the case which made it a question for the jury. It need not be stated here, and it is sufficient to say that it will be found in the testimony of Beckwith and the cross-examination of the defendant.

In this connection we allude to some assignments based on questions relating to the contract between Pritchard and the plaintiff. That transaction was competent to show whether rights to repair were included, and it was of no consequence whether defendant was present, or a party to that bargain, because it in no way depended upon her consent. The transfer of the lease did. She consented to that, and defendant had a right to acquire Pritchard's existing rights to improvements, under another contract.

It is true, as claimed by the defendant, that if the contract to repair and improve had been performed, and such performance had been accepted as a full performance of the whole or the particulars in which it had been performed, a right to further claim was thereby lost, and could not be acquired. The court could not safely have directed a verdict for the defendant. As to the declaration we think that it should not be so strictly construed as to exclude proof of such a transfer.

The instruction of the learned circuit judge concluded the question, for he instructed the jury that the lease and the preliminary contract were both parts of one transaction, and must be construed together, and that all rights in both passed under the assignment of the lease. Hence they could not avoid finding that whatever rights Pritchard had were assigned with the lease, whether that was the agreement and intention of the parties or not. That

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the preliminary agreement was a valid contract when made does not admit of a doubt. Had Pritchard afterwards refused to execute the lease, defendant would have had a cause of action upon the contract. After he signed the lease his right of action for a failure to repair in case of a failure by defendant, would depend not upon the lease, but upon the contract.

This contract was not merged in the lease, which neither contains its substance, nor refers to it in any way. Neither is the lease in any way inconsistent with its continuance as a valid binding obligation of the parties.

Counsel for the defendant have cited many cases to the proposition that such are separate collateral contracts, and we list some of them in our opinion, without discussion: *Angell* v. *Duke*, L. R. 10 Q. B. 174; *Clenighan* v. *McFarland*, 16 Daly (N. Y.), 402; *Hoby* v. *Roebuck*, 7 Taunt. 157; *Morgan* v. *Griffith*, L. R. 6 Exch. 70; *Erskine* v. *Adeane*, L. R. 8 Ch. App. 756; *McGrath* v. *City of Boston*, 103 Mass. 369; *Close* v. *Railway Co.*, 64 Iowa, 149; *Tillman* v. *Fuller*, 13 Mich. 123; *Whiting* v. *Ohlert*, 52 Mich. 462.

Counsel for the plaintiff insistently urge the application of the rule that where several instruments are made between the same parties at the *same* time they form one entire contract and are to be construed together as one transaction, a rule as well settled as any in our jurisprudence. All such may be read together to ascertain the interpretation to be put upon any of them, if it is uncertain. That is no more than interpreting an instrument in the light of the surrounding circumstances.

There are many other assignments of error relating to the admission of evidence. They will not necessarily arise upon another trial, and we think it unnecessary to discuss them.

The judgment is reversed, and a new trial ordered.

BLAIR, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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TAYLOR v. R. D. SCOTT & CO.

1. STATUTE OF FRAUDS — CONTRACT TO SELL LAND — CORPORATE ACTION.

A written proposal to purchase real estate addressed to defendant corporation and to certain individuals as trustees of an estate, such persons constituting the board of directors of the corporation, upon which a majority of the individuals addressed indorsed their acceptance as trustees, there having never been any formal action taken by the board of directors, is not a contract in writing, binding on defendant corporation, and answering the requirements of the statute of frauds, though the trustees, by bill in chancery, to which neither plaintiff nor defendant corporation were made parties, obtained authority to sell as proposed.

2. CORPORATIONS—SALE OF PROPERTY—VALIDITY.

Either corporate action formally taken, or the assent of all parties in interest, is essential to make a valid contract for the sale and disposition of real estate.

Error to Oakland; Smith, J. Submitted June 21, 1907. (Docket No. 91.) Decided September 20, 1907.

Assumpsit by Charles V. Taylor against the R. D. Scott & Company for breach of contract of sale. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

James H. Lynch (*John C. Donnelly*, of counsel), for appellant.

Perry & Stockwell, *Patterson & Patterson*, and *Andrew L. Moore*, for appellee.

MONTGOMERY, J. Robert D. Scott died May 11, 1904, testate. At the time of his death he owned 6,499 shares of the 8,000 shares of the capital stock of the defendant corporation, which was capitalized at $80,000, the shares thereof being of the face value of $10 each. The busi-

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ness of the corporation was the manufacture and sale of vehicles. By his will he left such stock to William R. Scott, Frederick L. Ward, Frank G. Jacobs, and Everett S. Todd, in trust, to be held and controlled by them for five years. At the end of five years his interest in such corporation must be distributed to certain beneficiaries named in such will, excepting the share bequeathed to one daughter, which then, under the terms of the will, must go to his daughter, Mary D. Ward, in trust. The will was probated and the testamentary trustees accepted such trusts and promptly entered upon their duties as such trustees. The board of directors, consisting of five members, was reorganized, and William R. Scott, Mary D. Ward, Everett S. Todd, Frank G. Jacobs, and Frederick L. Ward were the directors of such corporation at the time the negotiations with the plaintiff were conducted and to the time of the trial of this case in the circuit court.

The business had not proven profitable, owing, it is said, to want of capital, and on the 19th of March the plaintiff made the following proposition in writing:

"PONTIAC, MICH., 1906.

"R. D. SCOTT & COMPANY,
"E. S. TODD,
"W. R. SCOTT,
"F. E. WARD,
"F. G. JACOBS,
Trustees of the R. D. Scott Estate.

"*Gentlemen:* I hereby submit to you for your consideration and acceptance the following proposition to purchase the plant, machinery, merchandise and business of the R. D. Scott Company.

"I will purchase the real estate known as R. D. Scott & Company's factory, situated on the D., G. H. & M. R. R. tracks in the west portion of the city of Pontiac; also the building used in connection as a warehouse, situated on the ground along by the D., G. H. & M. R. R. together with all the machinery, office fixtures, tools and equipment, and will pay you therefor the sum of $10,000 (ten thousand dollars).

"The real estate referred to above is described as all

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that part of Out Lot 21 on the northeast quarter of section 32, lying west of Baum & Terbush's lands, and east by the D., G. H. & M. R. R. right of way. Also Lot No. 7, subdivision of Out Lots 22 and 23, and part of 13, and the southeast quarter of section 29.

"I will also purchase all the material which you may have on hand on the first day of April, 1906, contained in the above-mentioned factory and used in the manufacture of your present line of work, and pay you for the same eighty per cent. of the market price of said material.

"Any other material not used in the manufacture of the present line as shown in your latest catalogue, you are to remove from the factory by May 1, 1906.

"Any complete jobs which are crated and ready for shipment April 1, 1906, are not to be considered as a part of this material, but are to be shipped and billed by you as your property. I will, however, allow you to store them in the factory without expense until you are able to ship the same.

"I am enclosing you my individual check for $5,000 (five thousand dollars) to apply on the purchase price when the property is properly deeded and transferred to me. It is my understanding that it will be necessary to have the sale, if made, approved by the probate court.

(Signed) "C. V. TAYLOR."

Below and to the left are the words "Accepted" and under it Frederick L. Ward, trustee; Frank G. Jacobs, trustee; William R. Scott, trustee; E. S. Todd, trustee. At the same time plaintiff prepared his personal check payable to R. D. Scott & Company on delivery of the plant, the check being for $5,000.

The trustees on the 29th of March filed a bill of complaint, in the circuit court of Oakland county, in chancery, in which bill all the persons who were interested in the R. D. Scott estate, either directly or in a representative capacity, were made parties; but neither the plaintiff nor the defendant corporation were parties. The bill proceeds upon the theory that the right of the trustees to consent to the proposed sale was doubtful, and that application should be made to the court of chancery for authority and direction in the premises and the prayer of the bill was

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that the court should so construe the will as to authorize the trustees to consent that the directors and stockholders of the corporation of R. D. Scott & Company might take the necessary steps and action to make a sale of the property embraced in the proposition above cited.

By the decree of the court the complainants in the case, the trustees, were authorized to consent to the sale by the corporation, R. D. Scott & Company, of the property embraced in the proposition signed by Taylor, and the completing, consummating, and carrying into effect of said sale. The decree was made on March 31st. On the evening of the day the decree was granted a waiver of notice of stockholders' meeting and resolution to be passed by them and by the board of directors was prepared.

Immediately after the court announced the decree and before it was formally entered, Mr. F. G. Jacobs, with whom negotiations had been conducted by Mr. Taylor, called up Mr. Taylor by telephone and informed him that the court had granted authority to sell and that he could go ahead at once with the inventory. Taking the inventory, however, was delayed for the convenience of the defendant until Tuesday when the taking of an inventory was begun by a representative of Mr. Taylor and a representative of the defendant company; but before the inventory was completed, or any further steps taken, and on the morning of the 4th of April, the buildings were entirely destroyed by fire. Mr. Jacobs, who was the custodian of the check accompanying the proposition, tendered it back to plaintiff. All negotiations ceased, and this case is brought upon the theory of a completed contract to recover damages for the breach thereof.

It should be further stated that at no time was a formal meeting of the board of directors of the defendant corporation or of the stockholders called for the purpose of authorizing a sale of the corporate property. Those who constituted a majority of the directors of the corporation were also trustees under the will of R. D. Scott and signed a tentative acceptance of the proposition as such trustees.

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The only time that they were together as a body, and at this meeting Mary D. Ward was not present, was on Sunday, March 18th, and the evidence shows that the signature of Frederick L. Ward was affixed to the instrument on Sunday. The circuit judge at the conclusion of the testimony directed a verdict for the defendant, and the plaintiff brings error.

We think it cannot be held that there ever was a valid contract in writing, binding upon the defendant corporation, and answering the requirements of the statute of frauds. The proposition itself was addressed to R. D. Scott & Company, and also to E. S. Todd, W. R. Scott, F. E. Ward, and F. G. Jacobs, as trustees of the R. D. Scott estate. The only acceptance in writing was a purported acceptance by these trustees. There is nothing in the writing to indicate that in accepting the proposition as trustees of the R. D. Scott estate these parties were assuming to act as directors of R. D. Scott & Company.

The acceptance as given was subject to the approval of the probate court. But assuming that the chancery court was treated by both parties as a substitute for the probate court, that court was appealed to by the trustees of the estate as such. One of the directors was in the Philippines, and one of the resident trustees signed this tentative agreement on Sunday. We have a case, then, in which no corporate action was formally taken. We have no written contract purporting to have been made on behalf of the corporation, nor do we have in writing in any form the assent of all interested parties.

If the rule of law be as contended for by plaintiff, viz., that the absence from the country of a member of the board of directors making service impracticable renders effort to make such service unnecessary, yet action by the other members of the board having notice, as members of the board, is in such case essential, and this we have not in the present case. Either corporate action formally taken, or the assent of all parties in interest, is

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essential to make a valid contract for the sale and disposition of real estate. *Lockwood* v. *Boom Co.*, 42 Mich. 536; *Peek* v. *Novelty Works*, 29 Mich. 313; *Doyle* v. *Mizner*, 42 Mich. 332; *Broughton* v. *Jones*, 120 Mich. 462.

If it be assumed that the board of directors possess the power to close out the entire business of the corporation without a vote of the stockholders formally called or the assent of all the stockholders—as to which see 3 Thompson on Corporations, § 3983—it is not too much to require that the formalities requisite to the making of a valid contract shall in such case be strictly observed.

The circuit judge reached the correct conclusion, and the judgment will be affirmed.

BLAIR, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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CITY OF DETROIT *v.* DETROIT MANUFACTURERS' RAILROAD.

1. RAILROADS—STREET RAILROADS—DISTINCTION.

Where the purpose for which a railroad was constructed and is operated is that of a steam railroad, to carry frieght to and from manufactories and business houses not otherwise accessible by the steam railroads, the facts that the company owning it was organized under the train railway act (chapter 167, 2 Comp. Laws), and that the track is laid along a highway, do not make its use that of a street railway, the company having been reorganized under the general railroad law, and its property having been leased to a steam railroad company.

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2. SAME—TAXATION—STATE OR LOCAL ASSESSMENT.

The property of the Detroit Manufacturers' Railroad, a corporation organized under the general railroad law, is assessable by the State board of assessors, under Act No. 173, Pub. Acts 1901, and not by the local taxing officers of the city of Detroit, though the road is laid along a street of the city, and was built by a company organized under the train railway act.

Case made from Wayne; Donovan, J. Submitted October 5, 1906. (Docket No. 10.) Decided October 4, 1907.

Assumpsit by the city of Detroit against the Detroit Manufacturers' Railroad for taxes. There was judgment for plaintiff, and defendant appeals. Reversed.

N. E. Slaymaker (*Henry Russel*, of counsel), for appellant.

P. J. M. Hally and *Frank E. Doremus* (*T. E. Tarsney*, of counsel), for appellee.

HOOKER, J. This is an action brought by the city of Detroit against the defendant, a corporation organized in March, 1903, under the provisions of the general railroad law of the State, 2 Comp. Laws, chap. 164, to recover for taxes assessed for the years 1903 and 1904. The action was defended upon two grounds, and error is alleged upon the refusal to enter a judgment for the defendant. The grounds referred to are:

1. That the tax was void, not having been assessed by the State board of assessors, under Act No. 173, Pub. Acts 1901, as amended by Act No. 45, Pub. Acts 1903.

2. That the tax for 1903 was void for the reason that it was assessed against the Detroit Terminal Railway, and not against the defendant.

It was proved upon the trial that the city tax roll for 1903 shows that the Detroit Terminal Railway was assessed for that year on a personal property valuation of $100,000, the tax levied being $1,656.82, which with accrued

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interest amounted to $2,151.37 at the time of the trial. The roll for 1904 showed an assessment against the defendant on the same valuation, the tax levied being $1,532.71, amounting to $1,827.74 at the time of the trial, and that no part of said taxes or either of them had been paid.

It was also shown that the Detroit Transit Railway was incorporated September 21, 1872, under the train railway act, chap. 167, 2 Comp. Laws, and that on March 21, 1873, the city council passed an ordinance granting to the Detroit Transit Railway, for a period of 30 years, the right to construct and operate a railway in certain streets of the city of Detroit, from such a point as it and the Detroit & Milwaukee Railroad Company might agree upon for a connection to the eastern limits of the city, subject to said corporation obtaining the right through private property on the line of the road. These rights were extended for 30 years by a new ordinance in 1901. The ordinance required the use of animal power at certain hours of the day, permitting the use of steam and other power to operate the trains between the hours of 6 p. m. and 6 a. m. The road was built and put in operation.

The Detroit Terminal Railway was also organized under the train railway law, on July 26, 1901, and on September 23d of that year purchased all of the railroad property, rights, and privileges of the Detroit Transit Railway.

On March 31, 1902, the defendant purchased from the Detroit Terminal Railway all of its property and rights, and during 1903 and 1904 owned the same, and the road was, during those years, operated by the Michigan Central Railroad Company, a corporation existing under the general railway laws of the State, for switching cars and transporting freight for shippers along the line thereof, and to points beyond, in the United States and elsewhere. It appeared that by an agreement between the defendant and the Michigan Central Railroad Company the exclusive possession and control of the road was transferred to the latter company for 25 years from the time when the road should be reconstructed by said company. It has

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been in its possession since April, 1902, has been operated by steam power, and since that date has been reconstructed.

It was admitted, subject to the objection of immateriality, that all of the property of the defendant was taxed by the State board of assessors in 1903 and 1904 on a valuation of $100,000, and that it paid taxes pursuant thereto in 1903 amounting to $1,691.15. At the time of the trial it had not paid the tax for 1904, but claims to have done so since.

Defendant has appealed from a judgment for the plaintiff. Counsel for the city say that the only question in the case is whether the personal property formerly owned by the Detroit Transit Railway, and now owned by the defendant, is street railway property or railroad property, within the meaning of Act No. 173, Pub. Acts 1901, and they concede that if it is railroad property, not merely used by and owned by a railroad, but in the full and general acceptance of that term railroad property, it is not subject to taxation in Detroit and is only taxable under the provisions of that act.

Section 4 of Act No. 173, Pub. Acts 1901, makes it the duty of the State board of assessors to make an annual assessment of the property of railroad companies. If the term railroad companies be assumed to refer only to companies organized under the general railroad law, the defendant is within the description. It is contended that this railroad must be considered a street railway for the reason that it is constructed in a highway, was first built by a company organized under the train railway law, accepted an ordinance from the city authorizing and restricting its construction and operation, and has the right to carry freight and passengers.

We are of the opinion that it is fairly inferable from this record that the purpose for which this railway was constructed, and has been and is now operated, is that of a steam railroad, to carry freight to and from manufactories and business houses not otherwise accessible by the

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steam railroads. The ordinance seems to have contemplated such use, and the road has been acquired by a railroad company and by it leased to another well known steam railroad company, which is apparently using it in connection with its own road. The fact that it is laid along a highway does not make its use that of a street railway, for steam roads are sometimes granted the use of streets, nor does the fact that it was organized under the train railway act. This was done by the city of Monroe, as appears in the case of *City of Monroe* v. *Railway*, 143 Mich. 315, and it has been done by other cities, both within and outside of this State.

Sections 4 and 5 of Act No. 173, Pub. Acts 1901, provide:

"SEC. 4. It shall be the duty of said board to make an annual assessment upon an assessment roll to be prepared by said board, of the property having a situs in this State as hereinafter defined, of railroad companies, union station and depot companies, express companies, doing business within this State, car loaning companies, and refrigerator and fast freight line companies, and all other corporations owning, leasing, running or operating any freight, stock, refrigerator, or any other cars, not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this act, over or upon the line or lines of any railroad or railroads in this State.

"SEC. 5. The term property as used in this act shall be deemed to include all property, real or personal, belonging to the corporation subject to taxation under this act, including the right of way, roadbed, stations, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph or telephone poles, wires, conduits, switchboards, and all other property used in carrying on the business of said corporations or owned by them respectively, and all other real and personal property and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property."

Under this act the duty of the board is plain, and without doing violence to the language, if not the apparent

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intent of the legislature, we cannot say that any railroad company, organized under the provisions of the general railroad law, is exempt from taxation under it, whether it acquired its property from manufacturers who manufactured it, or from railway companies organized under some other statute, who purchased, manufactured, or constructed it, or whether it operates a track built in a street in a city, under authority granted by a council, or in a country district or highway. A city may withhold a franchise to build and operate a railroad in a street, and it is not impossible that it may make the payment of a local tax a condition, but this would not relieve such a company from its statutory liability to pay taxes. We should not be inclined to hold that calling a road a street railway, or building it in a street, would absolve the railroad company from its liability under Act No. 173, even though it operated a typical street railway. Doubtless if it purchased one, and was permitted to operate it, or if it was organized for the purpose, and constructed it, it would be required to perform the conditions of its franchise, though the result should be that it was doubly taxed. See *City of Monroe* v. *Railway*, supra. But this record shows no condition as to taxation in the original franchise. We are, therefore, of the opinion that the property in question was taxable under Act No. 173 of the Public Acts of 1901, and, being so taxable, it was not subject to local taxation by the plaintiff, for section 13 of said Act No. 173 (this section was amended by Act No. 45, Pub. Acts 1903), among other things, provides: "Said taxes shall be in lieu of all taxes for State and local purposes."

We do not discuss the question of the lawfulness of a railroad company's operation of a street railway, because it is unnecessary to decide it.

The judgment is reversed, and a new trial ordered.

MCALVAY, C. J., and CARPENTER, OSTRANDER, and MOORE, JJ., concurred.

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STEVENS *v.* CITY OF PORT HURON.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—POWER TO LEVY—STREET SPRINKLING.

In this case, involving the power of the city of Port Huron to levy a special assessment upon city lots to pay for sprinkling the street upon which they abut, the power is denied; Mr. Justice HOOKER, with whom concur Chief Justice MCALVAY and Justices GRANT and OSTRANDER, denying the power on the ground that the sprinkling is of no substantial or permanent benefit to the property, and Mr. Justice CARPENTER denying it on the ground that the charter of the city does not authorize a special assessment for sprinkling by the front foot rule without any hearing as to benefits. MOORE, BLAIR, and MONTGOMERY, JJ., dissenting.

Cross-appeals from St. Clair; Tappan, J. Submitted January 18, 1907. (Docket No. 55.) Decided October 4, 1907.

Bill by Herman W. Stevens, Fannie F. Mitchell, and Jennie J. Wilson against the city of Port Huron to set aside an assessment for a sprinkling tax. From a decree sustaining defendant's demurrer as to complainant Stevens, and overruling the demurrer as to complainants Mitchell and Wilson, complainant Stevens and defendant appeal. Affirmed as to complainants Mitchell and Wilson and reversed as to complainant Stevens.

William T. Mitchell (*Stevens, Graham & Stevens*, of counsel), for complainants.

Joseph Walsh, for defendant.

HOOKER, J. An ordinance of the city of Port Huron provided for the assessment of the cost of sprinkling streets upon the premises abutting the street in proportion to street frontage, irrespective of the use made of the

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premises, and whether they are vacant lots, or lands having buildings upon them. A bill was filed on behalf of Fannie F. Mitchell, Jennie J. Wilson, and Herman W. Stevens, owners of premises in severalty, to set aside an assessment for such purpose. A demurrer to the bill was overruled as to Mitchell and Wilson, the assessment being held void as to them because their vacant property was assessed at the same rate per front foot as were residence properties. It was sustained as to Stevens, because the bill failed to show which of his property was vacant, it alleging that of a large number of separate lots only two had dwellings upon them. Stevens and the city have appealed. Counsel appear to agree that the meritorious question is whether it is lawful to base an assessment for street sprinkling upon the foot front rule.

The important question in this case is whether a statute authorizing a municipal corporation to pass an ordinance requiring the cost of street sprinkling to be assessed upon the abutting land in proportion to frontage, is valid. The cases where this question has been considered are few and discordant. The differences seem to rest on a disagreement among the judges as to whether it can truly be said that the sprinkling of a street can have any substantial or permanent effect upon the value of the premises; some holding that it does to some extent protect the property from injury, and makes the locality a more comfortable and therefore desirable one to live in, thereby enhancing rental value, and that consequently enhancement by paving and from street sprinkling differ only in degree. Other judges say that this is a similarity more fanciful than real, that it rests on a refinement of logic rather than a substantial and practical benefit, and that such a rule once established will furnish a precedent for the imposition of other burdens of like character, such as keeping streets and sidewalks free from ice, mud, water, snow, dust, etc., for the convenience of the traveling public, on no better ground than that a well kept street is more desirable for residence than one which is not. Of the cases called to

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our attention the earliest is *State* v. *Reis*, 38 Minn. 371.

The case turns upon the question indicated, a somewhat extended argument being made to show that, although the element of permanence is lacking, there is no difference in principle between sprinkling and paving, inasmuch as it cannot be claimed that the latter is eternal, or as stated in the opinion:

"But if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration, or imperishable in character. We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays, and has to be rebuilt every few years. When a pavement or sidewalk has worn out, the future value of the property is not enhanced by it, any more than it is by street sprinkling when that ceases. Neither do we see that it makes any difference whether the substance applied to the surface of the street is wood, which has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts, and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used."

This case was followed by *Reinken* v. *Fuehring*, 130 Ind. 382 (15 L. R. A. 624). It related to street sweeping, the cost of which was made the subject of local assessment. In its last analysis this case appears, like the other, to rest upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they (local assessments) can be sustained.

This case cites *Village of Carthage* v. *Frederick*, 122 N. Y. 275, decided in 1890, where an ordinance imposing

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a penalty for not cleaning snow and ice from a sidewalk was sustained. It appears to approve the suggestion that the imposition of such a burden on the landowner is defensible under the police power of the State, as "requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated that they can most promptly and conveniently perform it," a rather astounding and startling reason for imposing a public burden on a citizen.

The New York case is not left to rest upon this suggestion, however, for it closes with the significant language:

"We are unable to yield to this reasoning, because it overlooks not only public safety and general convenience, but also the peculiar interest that every owner or occupant of real property has in a clean sidewalk in front of his own premises. Whatever adds to the usefulness of a sidewalk, adds both to the rental and permanent value of the adjacent lot."

The Indiana case was followed by the case of *Sears* v. *City of Boston*, 173 Mass. 71 (43 L. R. A. 834). This was a sprinkling case, and the ordinance was sustained. That case freely admits that the power must rest upon the theory that the assessment is in the nature of a diminution of that which at first is a public burden, by subtracting from it the amount of the special enhancement of private property arising from the expenditure of public money in part for its benefit.

The court recognizes the gravity of the crucial question for it says:

"It is a grave question whether the benefit that comes to abutting property from the watering of the street in front of it is such an improvement to the property that it can be made the subject of an assessment upon it. There must be a real substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. The watering of streets produces only transitory effects, and makes no permanent change in the condition of the property."

But it continues:

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"It greatly promotes the health and comfort of the people generally, who use the streets from time to time, but its greatest benefit is to the abutting estates as places for residence or the transaction of business. Indeed, so much more important to the occupants than to the general public have been the benefits from watering streets that until lately the expense of the work in this Commonwealth has usually been borne by the abutters, who have procured the watering to be done by private contractors. If a special benefit, accruing from day to day, which very materially increases the rental value of real estate by reason of the proximity of the property to the place where the beneficial work is done, can be treated as an improvement within the reason of the rule which permits special assessments, then such assessments may be made to pay the expense of watering streets."

Yet it adds that it is,—

"With some hesitation, we hold that there is an improvement of private property, when this work is done by a city regularly from day to day, which may warrant an assessment upon the abutters. It was so held in *State* v. *Reis*, 38 Minn. 371, and in *Reinken* v. *Fuehring*, 130 Ind. 382 (15 L. R. A. 624), although the cases generally which uphold such assessments relate to improvements of a permanent character. Many improvements from which real estate receives an incidental advantage are held to justify only general taxation. *Hammett* v. *Philadelphia*, 65 Pa. 146; *Washington Avenue*, 69 Pa. 352; *City of Erie* v. *Russell*, 148 Pa. 384, 386; *Dyar* v. *Village of Farmington*, 70 Me. 515, 527; *State* v. *Chamberlin*, 37 N. J. Law, 388; *Dietz* v. *City of Neenah*, 91 Wis. 422, 427."

The doubt is finally resolved in accordance with the result reached in Minnesota and Indiana, and the case has been followed twice since in Massachusetts. See *Trustees of Phillips Academy* v. *Inhabitants of Andover*, 175 Mass. 118 (48 L. R. A. 550); *Stark* v. *City of Boston*, 180 Mass. 293.

Upon the other side of this question we find the case of *City of Chicago* v. *Blair*, 149 Ill. 310 (24 L. R. A. 412), where it was held that the sprinkling of streets is not a

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local improvement subject to local assessment. In the opinion we find the following:

"The only basis upon which either special assessment or special taxation can be sustained is, that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burthen imposed. * * * If, therefore, from an inspection of the ordinance authorizing the making of the improvement, it appears from the nature of the work proposed that the market value of abutting or adjacent property would not be increased thereby, as a matter of law it would not be a local improvement, within the meaning of the statute, and no declaration of the corporate authorities could make it so. * * * Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. * * *

"It cannot, we think, in any just sense, be said that street sprinkling is an improvement, within the contemplation of article 9 of the cities and villages act. In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled.

"It is insisted, however, that all improvements—the building of sidewalks, the paving of streets, of however lasting material,—are evanescent, and in a few years at most, will necessarily require renewing, and that it makes no difference whether it be water put upon the street, or wood or granite,—that all alike are but temporary in character. In a sense this is true, but not in a practical sense. It is common experience that well paved streets and convenient and durable sidewalks, furnishing access to property, do, in fact, enhance its market value.

"It is, however, insisted that the sprinkling of the streets during the summer months renders the occupation of adjacent property more enjoyable and comfortable, and that therefore the property is enhanced in value. Doubtless the same result would follow by placing vases at convenient points on the streets to be filled every morning with fresh cut flowers, or by open air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. So the employment of an efficient police force, whereby greater safety was felt, would add to

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the enjoyment and comfort of persons residing upon the street. The proper watering and clipping of the grass upon lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment, and possibly the healthfulness, of the locality. These all might be improvements, and increase, while they continued, the desirability of the property in their locality. But they are not improvements, either of the property or of the street, within the legislative contemplation when granting power to make local improvements by special assessments.

"The tendency of municipal government to arrogate to itself power and to encroach upon the rights of the citizen has led to the establishment of the statutory rules of construction, limiting its powers to those expressly granted, or arising, by reasonable and necessary implication, from the grant. It cannot, we think, be assumed that the legislature intended, by the language employed, to confer power upon the municipality to require work of the class provided for in this ordinance to be done by special assessment, even though it be held to be public work which the municipality is authorized to perform."

Pettit v. *Duke*, 10 Utah, 311, decided in 1894, held that a local assessment could not be imposed for street sprinkling. It is fair to say, however, that this case turned upon a construction of the charter, though the opinion rests the construction of the statute upon the distinction between paving and sprinkling, the former being considered a permanent improvement, while the latter is not. It is difficult to avoid the force of the statement regarding sprinkling, that—

"It is only useful while the work is continued, and in a few hours the beneficial effects are gone, and the property is worth no more than before the streets were sprinkled. It does not enhance the value of the abutting property, and therefore the city cannot demand special contribution by local assessment to bear the cost of the public work."

In *Kansas City* v. *O'Connor*, 82 Mo. App. 655, the court held:

"That portion of the contract providing for sprinkling

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the street was ultra vires. It was not within the power of the city to lay a special tax against the abutting property of the citizen for the purpose of paying for sprinkling. A special tax against abutting property is based and sustained on the idea that the work for which the tax is laid is an improvement of the property, and sprinkling to keep down the dust, while good for the comfort of the inhabitants, is too intangible to be denominated an improvement of the property."

The question again arose in the case of *New York Life-Ins. Co.* v. *Prest*, 71 Fed. 815, where Phillips, J., said:

"The sole foundation for the exercise of this extraordinary power, so often pressed to the utmost verge of toleration by these municipal governments, rests on the fact or assumption that it operates in the nature of conferring a practical, permanent benefit upon the property itself, independent of any fancy, whim or caprice of the occupant. The term 'local improvements,' on which the power asserted by this city charter is buttressed, had, at the time of the legislative grant, a well-known and sharply-defined meaning in law. As applied to a street, it meant the improvement of a street, as such, within the design of its creation, 'by reason of which the real property abutting or adjacent was especially benefited in its market value.' Cooley on Taxation, pp. 109, 110; 2 Dillon on Municipal Corporations (4th Ed.), §§ 752, 753. Its exercise is inseparable from the idea and purpose of permanency, and must be of that character which, presumptively, works out an enhancement of the market value of the property assessed. *Kankakee Stone & Lime Co.* v. *City of Kankakee*, 128 Ill. 176. The supreme court of Missouri manifestly entertains the same view. In *Neenan* v. *Smith*, 50 Mo. 529, the court says:

"'Local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer. The lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation for a moment stand.'

"This is reasserted by the court in *City of St. Louis* v. *Allen*, 53 Mo. 44, and the same view of the underlying principle runs like a thread of gold through the dis-

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cussion in *State* v. *Leffingwell*, 54 Mo. 458. On page 477 the court sums up the whole doctrine:

"'Private property cannot be taken for public use without a just compensation. Special benefits cannot form any part of such benefits, unless they attach to and become a part of the taxed property.'

"Without such test, Judge Wagner very aptly declares that 'the time will probably come when it will be deemed advisable to provide statuary and other costly adornments for the park.' Black, P. J., in *City of Clinton* v. *County of Henry*, 115 Mo. 569, speaking on this subject, said:

"'These cases hold that local assessments can be upheld, alone, on the ground of compensation in benefits to the particular property assessed.'

"This precise question has been considered and determined by the supreme court of Illinois in *City of Chicago* v. *Blair*, 149 Ill. 310 (24 L. R. A. 412). While it is to be conceded that, in some other jurisdictions, the contrary view has been expressed, the reason and authority of the Illinois court commands my entire approval. It holds that such an assessment as practiced by the city for street sprinkling was violative of fundamental law, because it is not predicable of an improvement—a betterment—of the adjacent property. * * *

"It is true the court was there demonstrating that the ordinance in question was not reasonably within the terms of the statute authorizing special assessments. But the legislative branch of the government is as much restrained by the fundamental law of the State in granting power to an integral part of the State, like a city, as the latter is controlled by the legislative grant. Carried to its logical extreme, where is the application of such a power, once conceded, to lead? Under such ordinances, streets are sprinkled in front of vacant lots on which are neither house nor any 'living creature.' It could hardly be said, with reason, that running a sprinkling cart now and then in front of such a lot adds to its market value. Nor is there, in such occasional 'laying of the dust,' any semblance of permanency. It is as evanescent as the early and the later dew, and, in my judgment, it is no more within the power of a municipality thus to create liens on the citizens' property than to hire a 'rain-maker' to vex

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the skies for refreshing showers, and charge the lots adjacent to the raindrops with the cost thereof. As the sprinkling of the public highways of a city like the cleaning thereof, contributes much to the comfort and enjoyment of the public, its cost should be made a general, and not a special, burden."

If the question before us is to depend upon the application of the doctrine recognized in most of the cases, viz., that a local assessment can only rest upon a substantial enhancement of values, rather than upon the idea that the public may impose this burden upon the citizen because he is so situated that he can "most promptly and conveniently perform a duty highly salutary and advantageous to the public," a doctrine which is alleged to rest upon the police power of the State, it seems to us that the view taken by the cases last discussed is the correct one. We think it unnecessary to discuss other questions.

The decree is affirmed, with costs, as to complainants Mitchell and Wilson, and reversed as to complainant Stevens, who will take the decree usual on the overruling of a demurrer, with costs of both courts.

MCALVAY, C. J., and GRANT, and OSTRANDER, JJ., concurred with HOOKER, J.

CARPENTER, J. The legislature empowered defendant's common council—

"To provide by ordinance for the * * * sprinkling of any of the streets of said city * * * by the city or by contract, and to levy and collect special assessments, to defray the costs and expenses of so doing, and to provide by ordinance the necessary means for carrying out the provisions of this section and the making of the necessary assessment rolls. The amount so assessed shall be a personal charge against the owner or occupant of the premises adjacent to which such sprinkling * * * is done, and be and remain a lien upon the property until the same is paid." Act No. 539, Local Acts 1903, chap. 7, § 54.

In accordance with this authority defendant's common

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council passed an ordinance providing that the streets which it determined to have sprinkled should be sprinkled by contract, and that the total expense should be levied upon the lots and premises abutting the street so sprinkled "in proportion to the number of feet fronting, abutting or touching on such street." In pursuance of this ordinance Military street in said city of Port Huron was sprinkled and the total amount of said cost assessed upon the abutting property owners. As would be inferred from this statement, no steps were taken to ascertain that the property assessed was benefited, and the owners were given no opportunity to be heard upon that question.

Complainants, whose property — some of which is vacant and some of which is occupied—abuts on said street and is assessed for said sprinkling, bring this suit in equity setting forth the above facts and also averring that their property was not benefited by said street sprinkling, and asking to be relieved therefrom. Defendant demurred to this bill. The cause was heard in the lower court and a decree therein rendered setting aside said assessment on the vacant property and sustaining it on the occupied property. Both parties appeal to this court.

Complainants contend that the proceedings for the levy of this assessment are void because the assessment was not apportioned according to benefits. They rely upon *City of Detroit* v. *Judge of Recorder's Court*, 112 Mich. 588, where it was said: "The sole ground for imposing a part or all of the cost of a public improvement upon one part of a municipality is that the part burdened with the cost receives corresponding benefits which the general public does not receive," and where we held invalid a street-opening law which provided that at least half of the amount required for opening the street should be raised by local assessments, saying:

"It contains no provision which requires the assessment upon the local district to be in proportion to the benefits received. The common council are not required

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to determine when they establish the district to what extent it is benefited. The jury are required to assess one-half upon the assessment district, regardless of whether it is benefited to that extent and are clothed with power to assess a larger amount only when they conclude that the benefit exceeds 50 per cent. The legislature has no power to fix an arbitrary percentage of a public improvement to be imposed upon a local assessment district, regardless of the benefits received."

Defendant's counsel contend that the case at bar is not within the principle of the above case, but is within the principle which is applied in paving a street. In such cases it is held that it is competent for the legislature to provide that the entire cost of paving the street shall be borne by the property abutting upon the street in proportion to its frontage. See *Sheley* v. *City of Detroit*, 45 Mich. 431; *Cass Farm Co.* v. *City of Detroit*, 124 Mich. 433, 181 U. S. 396; *French* v. *Paving Co.*, 181 U. S. 324. There is this distinction, however, between those cases and the case at bar. In those cases the legislature itself directed the entire cost of the improvement to be levied upon the abutting property in proportion to frontage. In the case at bar it has not done that. It has simply given the common council of defendant authority to collect the same by special assessments. It cannot be said that this distinction is unimportant. It was recognized by the Supreme Court of the United States in *French* v. *Paving Co.*, by quoting with approval from a former decision of the Supreme Court of the United States (*Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112), as follows:

"It has been held in this court that the legislature has power to fix such a district (assessing district) for itself without any hearing as to benefits for the purpose of assessing upon the lands within the district the cost of a local, public improvement. * * * But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited and the decision of that question is submit-

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ted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken."

In *Wight* v. *Davidson*, 181 U. S. 384 (this was a case similar to the *Cass Farm Company Case* and decided at the same time), the Supreme Court of the United States, in speaking of *Norwood* v. *Baker*, a former decision reported in the 172 U. S. 269, said:

"There the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is to the extent of such excess a taking under the guise of taxation of private property for public use without compensation."

The foregoing quotations are placed in this opinion, not because I regard them as correct statements of the law—for I candidly confess to a conviction that the law upon this subject is not yet settled—but for the purpose of showing the difficulty of bringing this case under the principle of the street-paving cases.

If we concede that the legislature might itself determine that the total expense of sprinkling a street should be assessed upon the abutting property owners in proportion to their frontage (and I make such concession only for the purpose of this opinion) and if we concede that the legislature may delegate this power to a municipality—and

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this concession is opposed to the principle declared in the foregoing quotations—the question arises whether in this case the power was delegated. If it was, it would, as already shown, permit a municipality to decide that a landowner is benefited by an improvement without giving him any opportunity whatever of being heard upon the question of benefits. A municipality certainly does not possess that power unless the legislature granted it. See *Detroit Citizens' St.-Ry. Co.* v. *City of Detroit*, 110 Mich. 384 (35 L. R. A. 859). The legislature did not expressly grant it. Was it granted by implication? It was not, unless it is to be implied from the grant of authority "to levy and collect special assessments, to defray the costs and expenses of" sprinkling the street. It is clear that defendant's common council might fully and effectively exercise this authority by proceeding in the usual manner, viz., by apportioning the assessments according to benefits after hearing the parties interested. To make said grant of authority effective it is not, therefore, necessary to infer a grant to the municipality of the unusual and extraordinary power of determining that a landowner is benefited by a public improvement without giving him any opportunity of being heard. Whether such power passed by implication is to be determined by the general rules applicable to the construction of municipal charters. Justice Cooley, in his work on Constitutional Limitations (7th Ed.), p. 271, says:

"The general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private incorporation. The reasonable presumption is that the State has granted in clear and unmistakable terms all that it has designed to grant at all."

Judge Dillon, in his work on Municipal Corporations (4th Ed), § 91, note 2, says:

"If upon the whole there be fair, reasonable, substantial

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doubt whether the legislature intended to confer the authority in question, particularly if it relates to a matter extramunicipal or unusual in its nature, and the exercise of which will be attended with taxes, tolls, assessments, or burdens upon the inhabitants, or oppress them, or abridge natural or common rights, or divest them of their property, the doubt should be resolved in favor of the citizen, and against the municipality."

Under these rules the power under consideration was not granted. It was certainly not granted in clear and unmistakable terms. It is an unusual power for a municipality to possess. This is the first time in the history of this court that a municipality has asserted such a power. Its "exercise will be attended with assessments upon the inhabitants" of the city. And inasmuch as it denies them a hearing upon the question of benefits it "oppresses them and abridges their natural rights." It follows that the proceedings for the levy of the assessment under consideration were fatally defective.

Defendant insists that complainants are not entitled to relief under the rule laid down in *Byram* v. *City of Detroit*, 50 Mich. 56, and other similar cases, where we held that one who stands by and permits public improvements to be made which benefit his property, cannot seek the aid of equity. The doctrine of these cases is not applicable, for it must be assumed, as stated in their bill, that complainants received no benefit from the alleged public improvement.

Complainants are, in my judgment, entitled to full relief.

MOORE, J. (*dissenting*). I do not reach the same result in this case as does Justice HOOKER. His statement of facts is sufficiently full for an understanding of the important question in the case, which I agree with him is whether a statute authorizing a municipal corporation to pass an ordinance, requiring the cost of street sprinkling to be assessed upon the abutting land, in proportion to frontage, is valid. I also agree with him that the author-

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ities are very much divided. He presents in his opinion very fairly the two lines of authorities, but from some of them which give an affirmative answer to the question, I desire to quote more freely than he has done.

Preceding the quotation which he has made from *State* v. *Reis*, 38 Minn. 371, is the following:

"While the public who travel it are also benefited by having the street sprinkled, yet it requires no argument to show that those who reside or do business on it receive an exceptional and special benefit from abating the nuisance of dust, which is a source not only of discomfort to them, but also of actual pecuniary injury to their household goods or merchandise. Sprinkling a street renders the property fronting on it more desirable, and hence more valuable, for occupancy,—a benefit not shared in by other property."

Following the quotation made by him is the following:

"The only essential elements of a 'local improvement' are those which the term itself implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally in the city. If it does this—rendering the property more attractive and comfortable, and hence more valuable for use—then it is an improvement. That the regular and systematic sprinkling of a street has this effect upon the property fronting on it is a matter of common knowledge. This construction is fully warranted by the definitions of the word 'improvement' given by lexicographers. It has been defined as 'that by which the value of anything is increased, its excellence enhanced, or the like;' or 'an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.'"

In the case of *Village of Carthage* v. *Frederick*, 122 N. Y. 275, the justice speaking for the court uses the following language:

"Chief Justice Shaw, in deciding a case, involving the collection of a penalty imposed for the violation of a municipal ordinance requiring the owners or occupants of

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houses bordering on streets to remove the snow from their respective sidewalks within a specified time, used this significant language:

"'It is not speaking strictly to characterize this city ordinance as a law levying a tax, the direct or principal object of which is the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and, therefore, indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid not upon a few but upon a numerous class, all those who are so situated and equally upon all who are within the description composing the class. * * * Although the sidewalk is part of the public street and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit often in accommodating his cellar door and steps, a passage for fuel and the passage to and from his own house to the street. * * * For his own accommodation he would have an interest in cleaning the snow from his own door. The owners and occupiers of house-lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community. Besides, from their situation, they have the power and ability to perform this duty with the promptness which the benefit of the community requires and the duty is divided, distributed and apportioned upon so large a number that it can be done promptly and effectually and without imposing a very severe burden upon any one.' *In re Petition of Goddard*, 16 Pick. (Mass.) 504, 509, 516.

"In a recent case this court, referring to the police power, said:

"'That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety, and welfare of society. * * * Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other.' *In re Jacobs*, 98 N. Y. 98, 108.

"And in another case the court declared that 'all property is held subject to the general police power of the State,

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to so regulate and control its use in a proper case, as to secure the general safety and the public welfare.' *People* v. *Gillson*, 109 N. Y. 389, 398.

"In both of the cases last referred to, the police power was distinctly recognized, but it was held that a statute, to be sustained as an exercise of that power, must have some relation to the public health, comfort or safety, and that the rights of property could not be invaded under the guise of a police regulation for the protection of health, when it was manifest that such was not the object of the regulation.

"The following authorities, some expressly and others in principle, justify the passage of the ordinance in question as a proper exercise of police power, lawfully delegated to a municipal corporation by the legislature: *People* v. *Mattimore*, 45 Hun (N. Y.), 448; *Mayor, etc., of New York* v. *Williams*, 15 N. Y. 502, 505; *Phelps* v. *Racey*, 60 N. Y. 10; *Cronin* v. *People*, 82 N. Y. 318; *Moore* v. *Gadsden*, 93 N. Y. 12, 17; *Dixon* v. *Railroad Co.*, 100 N. Y. 176, 179; *People* v. *Arensberg*, 105 N. Y. 123; *Vanderbilt* v. *Adams*, 7 Cow. (N. Y.) 349; *Coates* v. *Mayor, etc., of New York*, 7 Cow. (N. Y.) 585, 606; *Stokes* v. *New York*, 14 Wend. (N. Y.) 88; *Sharpless* v. *Mayor, etc., of Philadelphia*, 21 Pa. 147; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33.

"If this power of local legislation can be conferred upon the largest city in the State, it can also be conferred upon the smallest village that the legislature sees fit to incorporate. In this latitude the accumulation of snow upon sidewalks in large quantities is a matter of course. Its presence retards travel, interrupts business, and interferes with the safety and convenience of all classes. It is a frequent cause of accidents and thus affects the property of every person who is liable to assessment to pay the damages caused by a failure to remove it. But how is it possible for the authorities of a large city, with many hundred miles of streets, to remove the snow in time to prevent injury to those who have the right to travel upon the sidewalks unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door, and it is both reasonable and necessary that he should be compelled to do so. We think that the ordinance under consideration is valid; that it conflicts with no provision of the constitution, and that it is the duty of the courts to enforce it."

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In the case of *Sears* v. *City of Boston*, 173 Mass. 71 (43 L. R. A. 834), the following language is used in the opinion:

"This is a petition for a writ of certiorari to quash alleged illegal assessments laid to meet the cost of watering streets in the city of Boston under Stat. 1897, chap. 419. The first and most important question in the case is whether this statute is constitutional. The right of the legislature to raise money by taxation is founded upon article 4, chap. 1, § 1, of the constitution of the Commonwealth. Under this article there is authority 'to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities,' etc. This authority we need not consider in the present case. Secondly, there is authority 'to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and persons resident and estates lying within the said Commonwealth.' The watering of streets in thickly settled portions of cities is such a public benefit that it legitimately may be provided for at the public expense. So far as it promotes the comfort, convenience, and prosperity of the people generally, as distinguished from landowners, it should be provided for by general taxation, which involves the assessment of proportional and reasonable taxes upon all persons and property within the city. The statute purports to authorize every city, not only to 'appropriate money for watering the public ways, or portions thereof, within its limits at the expense, in whole or in part, of the city,' but also to 'determine that certain other public ways or portions thereof shall be watered at the expense, in whole or in part, of the abutters thereon. Stat. 1897, chap. 419, § 1. This last provision calls for another kind of taxation, which is local and special. Such taxation, under the constitution, can only exist when there is a special or peculiar benefit to certain real estate, different from that which is received by the inhabitants generally. The owners of the land upon which such an assessment is made must pay the same share of the general taxes in proportion to the value of their property that other persons pay. As the constitution requires that taxes shall be proportional and reasonable, this additional special tax can be justified only when there is a special benefit to property from the expenditure on account of which the assessment is made. *Wright*

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v. *City of Boston*, 9 Cush. (Mass.) 233, 234; *Dorgan* v. *City of Boston*, 12 Allen (Mass.), 223, 237; *Mount Auburn Cemetery* v. *Cambridge*, 150 Mass. 12, 14 (4 L. R. A. 836); *Norwood* v. *Railroad Co.*, 161 Mass. 259, 264; *City of Boston* v. *Railroad Co.*, 170 Mass. 95; *Norwood* v. *Baker*, 172 U. S. 269; *Stuart* v. *Palmer*, 74 N. Y. 183, 189; *Sharp* v. *Speir*, 4 Hill (N. Y.), 76, 82; *Hammett* v. *Philadelphia*, 65 Pa. 146, 157; *Tidewater Co.* v. *Coster*, 18 N. J. Eq. 518, 527; *City of Norfolk* v. *Chamberlain*, 89 Va. 196, 213; *Nichols* v. *City of Bridgeport*, 23 Conn. 189; *Thomas* v. *Cain*, 35 Mich. 155, 162; *Taylor* v. *Palmer*, 31 Cal. 240, 254; *Sheehan* v. *Good Samaritan Hospital*, 50 Mo. 155. In the last analysis the assessment is not laid as a part of the burden of public expenditure put upon the land; for the burdens which are strictly public are to be shared proportionally by all the people, according to the value of their taxable property. It is rather in the nature of a diminution of that which at first is a public burden, by subtracting from it the amount of the special enhancement of value of private property from the expenditure of public money in part for its benefit. It is taxation in the sense that it is a distribution of that which is originally a public burden, growing out of an expenditure primarily for a public purpose.

"It is a grave question whether the benefit that comes to abutting property from the watering of the street in front of it is such an improvement to the property that it can be made the subject of an assessment upon it. There must be a real substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. The watering of streets produces only transitory effects, and makes no permanent change in the condition of the property. It greatly promotes the health and comfort of the people generally, who use the streets from time to time, but its greatest benefit is to the abutting estates as places for residence or the transaction of business. Indeed, so much more important to the occupants than to the general public have been the benefits from watering streets that until lately the expense of the work in this Commonwealth has usually been borne by the abutters, who have procured the watering to be done by private contractors. If a special benefit, accruing from day to day, which very materially increases the rental value of real estate by rea-

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son of the proximity of the property to the place where the beneficial work is done, can be treated as an improvement within the reason of the rule which permits special assessments, then such assessments may be made to pay the expense of watering streets. With some hesitation, we hold that there is an improvement of private property, when this work is done by a city regularly from day to day, which may warrant an assessment upon the abutters. It was so held in *State* v. *Reis*, 38 Minn. 371, and in *Reinken* v. *Fuehring*, 130 Ind. 382 (15 L. R. A. 624), although the cases generally which uphold such assessments relate to improvements of a permanent character. Many improvements from which real estate receives an incidental advantage are held to justify only general taxation. *Hammett* v. *Philadelphia*, 65 Pa. 146; *Washington Avenue*, 69 Pa. 352; *City of Erie* v. *Russell*, 148 Pa. 384, 386; *Dyar* v. *Village of Farmington*, 70 Me. 515, 527; *State* v. *Chamberlin*, 37 N. J. Law, 388; *Dietz* v. *City of Neenah*, 91 Wis. 422, 427."

I do not make reference to the cases which hold such a statute is not valid, for the reason that they are very fully referred to in the opinion of Justice HOOKER.

It must be conceded that in principle the case at bar cannot be distinguished from those where the lot owner is required to keep his sidewalk free from mud, snow, and slush. It is a matter of common knowledge that the several charters granted to cities and villages in this State confer upon the common councils of said municipalities the right to pass ordinances of the character just mentioned. It is also a matter of common knowledge that the legislature has conferred upon municipalities the right to pass ordinances like the one now under consideration, and that ordinances of like character have been in effect in many cities and villages in this State for many years.

We think it also a matter of common knowledge that people who can afford it will not willingly reside in a residential district where the streets are not sprinkled during our hot and dusty summers; nor would one willingly engage in retail trade upon such a street. If the property owner desired to rent his property so situated he would receive a larger rent than he would if it was understood

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the streets in that district were to remain unsprinkled. This would be equally true did he desire to sell.

We think it very clear a real estate dealer would find that a lot in a residential district or in a retail business center would sell more readily and for a better price, if he could assure a prospective buyer that the street upon which it abutted would be kept sprinkled during the hot and dusty summer, than if he was obliged to say to him it would not be sprinkled. It would also be found that the increased value of the lot would not be disproportioned to the amount levied upon the property to pay for the sprinkling. The tax is levied not for sprinkling one day simply, but for the season. The tax levied is small. It amounts to only about ten cents a foot front for the entire season. The sprinkling of the street appreciably increases the comfort of the occupants of the property, and as before stated increases its rental value as well as its sale value. 2 Cooley on Taxation (3d Ed.), p. 1,178 et seq.

As the question is a new one in this State, and as ordinances of like character are almost universal in our cities and villages, and in many of them have been acted upon for years, and as there is abundant authority from very respectable courts holding like ordinances valid, and as the opinions so holding seem to be logical, I think we should follow them rather than the other line of cases. The parties having delayed until the service was fully rendered are concluded from attacking the proceedings on technical grounds under *Byram* v. *City of Detroit*, 50 Mich. 56.

The decree should be affirmed as to complainant Stevens, with costs, and should be reversed as to complainants Mitchell and Wilson, with costs.

BLAIR, and MONTGOMERY, JJ., concurred with MOORE, J.

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BEATON *v.* TOWNSHIP OF INLAND.

EQUITY — JURISDICTION — CANCELLATION OF INSTRUMENTS — ACCOUNTING—TOWNSHIP TREASURER—RECEIPTS.

Equity has jurisdiction of a bill by a township treasurer against his predecessor in office for an accounting of the money and funds turned over to complainant and to cancel a receipt for such funds if found to be, through fraud or mistake, for too great a sum. OSTRANDER, J., MCALVAY, C. J., and GRANT, J., dissenting.

Appeal from Benzie; Chittenden, J. Submitted January 23, 1907. (Docket No. 100.) Decided October 4, 1907.

Bill by Henry E. Beaton against the township of Inland and Edward Smock for a determination of the amount received as township treasurer by complainant from defendant Smock, for a cancellation of a receipt, and for a determination of the amount belonging to the township in the hands of defendant Smock. From a decree sustaining a demurrer as to defendant township, and overruling the demurrer of defendant Smock, he appeals. Affirmed.

Complainant is treasurer of the township of Inland. His predecessor in office was defendant Smock. It is alleged in the bill of complaint that the clerk of the township and defendant Smock told complainant that he should receive from Smock the sum of $3,530.31, township funds; that there was turned over to him by Smock in cash and in checks $2,156.28, and in orders, receipts, and account for returned taxes $1,374.03, which said Smock represented to be a portion of the larger amount and for which he should have credit. Complainant gave to said Smock a receipt for the sum of $3,530.31, "for money and evidence of money that he so received from the said Edward

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Smock." After assuming the duties of the office of treasurer, complainant discovered "what he then and now believes to be an error," arising out of the fact that Smock had already received credit, as treasurer, for items going to make up the sum of $1,374.03. He reported this discovery to the township board, which entered upon an investigation, with the result that it was found complainant should have received from Smock "$3,034.16 or thereabouts," being $877.88 more than he did receive and less than he receipted for. The township board declines to take any action in the matter beyond informing complainant that it concerned himself and Smock only and it would look to complainant and his bondsmen for any money belonging to the township. It is inferentially averred in the bill that the township and the outgoing treasurer had a settlement, as the law requires, 1 Comp. Laws, §§ 2356, 2346. Whether the statement required by 1 Comp. Laws, § 2350, to be made was so made and published does not appear. The relief asked for is, a determination of the sum actually received by complainant from said Smock, the cancellation of the receipt given to Smock, determination of the sum in the hands of Smock belonging to the township. The demurrer of the township to this bill was sustained; that of defendant Smock was overruled. He has appealed from the order overruling his demurrer.

D. G. F. Warner, for complainant.

Smurthwaite & Alway, for appellant.

OSTRANDER, J. (*after stating the facts*). The court below was of opinion that complainant was accountable to the township for no more money than he received, for which reason a court of law was the proper forum in which to settle such differences, if any, as shall arise between them; that having given defendant Smock a receipt for more money than he received, complainant was entitled to a return of the receipt or the balance of funds necessary to make the receipt accord with the facts, and

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that a court of equity would cancel the receipt if, upon an accounting had in that court, it appeared that by mistake or by fraud it was for too large a sum.

No case is made for an accounting. The township and defendant Smock had a settlement as the law requires and neither party to it questions it. I do not understand that after making his settlement (accounting) with the township board an outgoing treasurer relieves himself and his sureties to the extent that he succeeds in inducing his successor to believe that vouchers for which he has already received credit are uncanceled. In a suit of the township against complainant, he would be obliged to account for the money he received from his predecessor. The receipt he gave his predecessor would be, unexplained, evidence of the amount he did receive. It is mere evidence and can be contradicted or explained by parol testimony. *Johnson* v. *Insurance Co.*, 39 Mich. 33; *Vyne* v. *Glenn*, 41 Mich. 112; *Powell* v. *Powell*, 52 Mich. 432; *Hart* v. *Gould*, 62 Mich. 262. The grounds of equitable jurisdiction asserted are fraud in obtaining the receipt; inability to obtain, otherwise, immediate relief from the apparent liability evidenced by the receipt; possible inability, arising from death or lapse of time, to establish the invalidity of the receipt, when, if ever, it shall be offered to bind complainant, his estate, or his sureties. Complainant was elected to office in April, 1905. His bill of complaint was verified December 14th of that year, and the decree of the court below is dated September 14, 1906. Whether any action in the premises has been taken by the township, we are not informed. I think the mere fact that a receipt is given at the conclusion of an alleged fraudulent transaction relating to personal property is not enough to establish the jurisdiction of a court of equity to investigate the transaction for the purpose of canceling or refusing to cancel the receipt. I have found no precedent for such action. It is urged that in this case there is the additional fact that complainant may not himself attack the transaction in a suit at law but must await at-

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tack. I think this fact is insufficient to support equity jurisdiction in this case. Complainant notified the township of the claim he makes. The township has discredited the receipt so far as the amount therein stated is concerned. It seems to me, therefore, that the receipt was explained to the township authorities before the bill was filed, apparent effect denied by complainant, and the fact that it did not truthfully evidence the actual turning over of funds by Smock was admitted by the township authorities. As the case stands, no decree binding upon the township can be entered, complainant is entitled to no money decree against defendant Smock, and the relief granted must be in any event the mere cancellation of the receipt. Without denying or discussing the jurisdiction of equity to cancel, in certain cases, a writing which might be used as evidence, where such writing has been procured by fraud (see 6 Cyc. pp. 294, 295, and notes), I am of opinion that such a case is not presented by the bill.

The decree is reversed, and a decree will be entered here sustaining the demurrer of defendant Smock, with costs of both courts. The record will be remanded and complainant will be given 30 days in which to file an amended bill if he desires to do so.

MCALVAY, C. J., and GRANT, J., concurred with OSTRANDER, J.

HOOKER, J. In my opinion this case should be affirmed, being ruled by the following cases: *John Hancock Mut. Life-Ins. Co.* v. *Dick*, 114 Mich. 337 (43 L. R. A. 566); *Fidelity Mut. Life-Ins. Co.* v. *Blain*, 144 Mich. 218; *Fred Macey Co.* v. *Macey*, 143 Mich. 138, and cases cited.

CARPENTER, BLAIR, MONTGOMERY, and MOORE, JJ., concurred with HOOKER, J.

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GORE *v.* CANADA LIFE ASSURANCE CO.

1. PRINCIPAL AND AGENT — LIFE-INSURANCE COMPANY — UNAUTHORIZED CONTRACT BY AGENT—HOLDING OUT—ESTOPPEL.

   Where neither the manager of the Michigan branch of a life-insurance company nor the local superintendent of agents had authority to bind the company by a contract of employment of a solicitor, the company is not bound by such a contract made by them unless it has so held them out as having such authority as to induce the solicitor to rely upon it, and to estop the company from denying it.

2. SAME—HOLDING OUT—EVIDENCE—SUFFICIENCY.

   Possession by the manager of the Michigan branch of a life-insurance company of a single copy of a blank contract of agency, which the officers of the company testify they did not know he had and was not intended for use in Michigan, is not such a holding out of the manager as having authority to enter into such a contract on the company's behalf as to estop it from denying such authority.

3. SAME—RATIFICATION.

   Where a life-insurance company placed its business in Michigan in the hands of an agent upon the basis of a commission, and their contract contemplated the maintenance of headquarters here, and the soliciting of business by such agent through agents appointed by him, the company to assume no obligation to such soliciting agents, the fact that the company required bonds from the soliciting agents was not an admission that it had other contract relations with them involving a promise to pay for their services rendered to the general agent.

4. SAME.

   That under its contract with its Michigan agent the company placed a representative in the Michigan headquarters, who officiated as bookkeeper and custodian of the funds received which, under the contract, belonged to the company; and that in the books there kept and in the books kept at the home office a soliciting agent's name appears as credited with commissions due him and charged with payments, do not show a ratification of contract relations between the company and the soliciting agent, where the bookkeeping may

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be regarded as a necessary means of safeguarding the company's interests and maintaining the efficiency and economical administration of the branch in the interest of the agent and his solicitors as well as of the company.

5. SAME

That a life insurance company included plaintiff's name in the list of agents filed with the insurance commissioner pursuant to section 7246, 2 Comp. Laws, does not show a ratification of an unauthorized contract by the company's agent obligating the company to pay plaintiff's commissions on business secured for the agent by him.

Error to Wayne; Hosmer, J. Submitted January 24, 1907. (Docket No. 46.) Decided October 4, 1907.

Assumpsit by Henry H. Gore against the Canada Life Assurance Company for agent's commissions. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Maybury, Lucking, Emmons & Helfman, for appellant.

Russel, Campbell & Bulkley, for appellee.

HOOKER, J. This cause was before us on a former occasion and is reported in 119 Mich. 136, where the main facts are set forth at length. We then said that there were two theories upon which the plaintiff might recover in his action. *First*, that Glass actually had authority to make a contract that the defendant should pay for his services. *Second*, that the Company's conduct was such a holding out as to justify his belief that Glass had such authority, thereby constituting an estoppel to deny it. Plaintiff has again appealed from a verdict and judgment by direction of the court.

This record, like the other, conclusively shows that the Canada Life Assurance Company put its business in Michigan, i. e., the obtaining of applications for insurance and loans, which is the only business it does, in the hands of Cox, upon the basis of a commission. Their contract contemplated the maintenance of headquarters

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in Detroit and the soliciting of business by Cox through agents appointed by him; but it is beyond question that the company was to assume no obligation to such agents.

Cox appointed one or more persons to have charge of the business, one of whom, Bucknell, was known as manager of the Michigan branch, and another, Glass, went by the name of superintendent of agents. These men were paid salaries or commissions, possibly both, by Cox, and solicitors who worked upon commission, also paid by Cox, were appointed by one or both of them.

It is admitted that the plaintiff went to work at the business of soliciting applications for insurance in the Canada Life Company under an arrangement made with Glass. He states that Glass arranged with him to work *for* the Canada Life, and that he afterwards had talk with Bucknell, who was the manager, asking for a written contract, which Bucknell said he could have if he wanted it, and gave him a blank to fill up, at the same time telling him that the oral contract would be as good, as it was "just the same." This blank was apparently designed for a contract between the defendant company and agents who should contract directly with it. It contained blanks for the signatures of the president, secretary, and the agent, and nothing suggesting the intervention of a manager or other person conducting the Michigan branch appeared in it. It is contended that this statement of Bucknell showed an understanding of the parties to the conversation, viz., Bucknell and plaintiff, that the contract was made by the company.

We held upon the former hearing that neither Bucknell nor Glass had authority to so bind the company, and this as conclusively appears from the record. The defendant cannot be bound even if it was the understanding between Bucknell and the plaintiff that the defendant should be bound unless the record shows such a holding out of authority of the manager or Glass, as to induce plaintiff to believe and rely upon it, and to estop the defendant from denying it.

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The only fact in the nature of a holding out that plaintiff could then have relied on was the alleged possession of this blank, and the record contains nothing but the bare fact of the possession of this one copy to indicate that the company furnished to the Detroit office any such blank. The officers deny all knowledge of it, say that those blanks were for use in Canada, and not in Michigan, while Bucknell denies the entire story of the plaintiff regarding it. We think there is not such proof that the company clothed Bucknell with apparent authority as to constitute an estoppel.

In this connection we should allude to certain other testimony relied on to show that the company ratified such contract by treating plaintiff as its agent. This testimony consists largely of entries in books of the company, applications bearing plaintiff's signature as agent, a list of district agents, kept at the home office, filed with the commissioner of insurance of this State, and published in its advertising matter, the fact that under the contract with Cox the company had a representative at the Detroit branch, who officiated as bookkeeper, and as custodian of the funds received, which, under the contract with Cox, belonged to the company, in which books the plaintiff's name appears, as credited with commissions due him, and charged with payments, some of which were made by checks signed by the bookkeeper, and the further fact that in some cases bonds had been furnished by solicitors to the company though not by plaintiff. These facts are not inconsistent with the plainly established fact that the company never authorized the contract relied upon.

The course of business in the Detroit office is not in doubt. Under its contract with Cox all moneys received on policies was the money of the company. It reserved the right to approve or disapprove the selection of solicitors. Requiring of bonds from solicitors who received moneys was not an admission that it had other contract relations with them involving a promise to pay for their services rendered to Cox.

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When money was paid in it went into the hands of defendant's representative, who was authorized to disburse it as directed by the manager, within the lines of the Cox contract. It is not unnatural to suppose that the entire bookkeeping of the establishment was done by the company's agent, as a necessary means of safeguarding its interests, and maintaining the efficiency and economical administration of the business of the branch, in the interest of Cox and his agents as well as of the company, and it furnishes no evidence of a ratification of contract relations with plaintiff, and is in no sense an admission of such. The same may be said of other entries in company books, both at Detroit and in the home office.

A reference to 2 Comp. Laws, § 7246, Insurance Laws of Michigan 1905, p. 82, will show that all persons who in any manner aid in transacting the business of an insurance company are denominated agents, and are required to have certificates of authority issued by the department of insurance of the State, and that lists of such must be filed with the commissioner by the company.

Again, the record shows that the course of business of this company was to have its applications taken by solicitors, and turned in to the branch office, sent by its manager to the home office, where they were passed upon and rejected or accepted, and policies were returned through the branch office to the solicitor, who delivered them. If rejected, it is presumable that the money, if paid, was to be refunded. All of these things require bookkeeping at each step, and as already said it is not inconsistent with the absence of contract relations between the solicitor and the company. These applications were the culmination of negotiations between the prospective patrons and the solicitor, and the blanks contemplated statements of fact, by the solicitor or agent, as well as by the applicants, and assurances which could only be given by the solicitor were required of him.

We are of the opinion that the learned circuit judge was correct in saying that the additional evidence offered

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upon the last trial was not materially different in character from that offered at the earlier hearing, and that it would not have justified his submission of the cause to the jury. If the plaintiff has been wronged by the conduct of the managers of the Michigan branch in appropriating a portion of the commissions to which he is entitled, his remedy is not against the company.

The judgment is affirmed.

BLAIR, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

STEINER v. SUPREME COURT INDEPENDENT ORDER OF FORESTERS.

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158 707n

INSURANCE — MUTUAL BENEFIT INSURANCE — ACTION ON POLICY — EXHAUSTING REMEDIES WITHIN ORDER.

Where the laws of a mutual benefit insurance society provide that a member is bound by the decision of the chief officer unless he appeals therefrom to the executive council within 20 days from the date of the decision, and a member is not notified of the rejection of his claim by the chief officer until after more than 20 days have elapsed, notwithstanding the laws also provide that parties interested shall be notified at once whenever a decision is made, the member is not entitled to an appeal, and it cannot be said that he has not exhausted his remedy within the order before bringing suit upon his claim.

Error to Saginaw; Gage (William G.), J. Submitted February 13, 1907. (Docket No. 135.) Decided October 4, 1907.

Assumpsit by John J. Steiner against the Supreme

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Court of the Independent Order of Foresters on a policy of insurance. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

George C. Ryan (*R. L. Crane*, of counsel), for appellant.

Dickinson, Stevenson, Cullen, Warren & Butzel (*Choate & Webster*, of counsel), for appellee.

CARPENTER, J. Plaintiff was a member of and insured by the defendant order. Under the claim that he is totally and permanently disabled he brought this suit to recover on his contract of insurance. The trial court directed a verdict in favor of defendant upon the ground that plaintiff did not exhaust his remedies in defendant's order before bringing suit, and the correctness of this decision is the only question presented by this record. Was this decision right? Did the trial court err in directing a verdict on the ground that plaintiff did not exhaust his remedies in the order before bringing suit?

We state such facts as are necessary to a proper determination of this question. In January, 1900, plaintiff filed with defendant order a petition to be placed on the probationary list for total and permanent disability. (Until he was on this list six months he was not, under the laws of the order, entitled to the insurance sued for.) This petition, as required by the laws of the order, was submitted to the supreme chief ranger and he, on May 1, 1900, rendered a decision denying the same. Under the laws of the order plaintiff had a right to appeal from this decision to the executive council "within 20 days from the date of the decision," and the laws also provided that "the parties interested shall be notified at once whenever a decision is made." It was further provided that "any aggrieved party failing to take an appeal from any action or decision in the manner or within the time laid down in the constitution and laws of the order shall be bound by

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such action or decision and shall have no further recourse whatever, whether in law or equity in respect to the subject-matter of such action or decision," and also that "no member of the order shall be entitled to bring any civil action or other legal proceeding against the supreme court until he shall have exhausted all the remedies provided in the constitution and laws of the order by appeals and otherwise." According to the testimony of the plaintiff (which we must assume to be true), no notice of the decision of the supreme chief ranger was given until February, 1903—and this notice did not reach plaintiff until the following May or June—and he, therefore, made no attempt to appeal, as provided by the rules of the order. Under these circumstances is it correct to say that plaintiff did not exhaust the remedies in defendant's order before bringing suit? The provisions requiring an appeal to be taken "within 20 days from the date of the decision" and making said decision final, unless said appeal is taken, are to be read in connection with the provision that "the parties interested shall be notified at once whenever a decision is made." This is conceded by defendant's counsel, but they contend that the laws of the order, properly construed, gave plaintiff 20 days to appeal after he received notice of this decision, and because he did not appeal within said 20 days he did not exhaust his remedy in the order, as required by its laws. This contention would be more meritorious if it were shown that the defendant order had itself placed that construction upon its laws. In that case it may be that plaintiff and this court would be bound by such construction. But it does not appear that defendant has so construed these laws. Under these circumstances, we must construe them, and we cannot construe them in accordance with defendant's contention. Those laws say "all appeals must be taken within 20 days from the date of the decision," and not "within 20 days from the date the aggrieved party receives notice of the decision." Those laws also say that "any aggrieved party failing to take

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an appeal from any decision within the time laid down in the constitution and laws of the order shall be bound by such decision." In our judgment said defendant did not intend to give and, therefore, did not give, a right of appeal after the lapse of "20 days from the date of the decision." The construction which we place upon defendant's laws is this: A party aggrieved by a decision of the supreme chief ranger must appeal—and he is bound by the decision, if he does not appeal—within 20 days from the date of the decision, provided he is duly notified of the same. The contingency of an aggrieved party not being duly notified appears not to have been thought of and is not provided for. That party has, therefore, no right of appeal or any other remedy furnished by the laws of the order. Under this reasoning plaintiff had exhausted all the remedies of the order before bringing suit.

The trial court erred in directing a verdict for defendant. The case should have been submitted to the jury.

Judgment reversed, and a new trial ordered.

MCALVAY, C. J., and GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

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HODGES v. VALLEY CITY DESK CO.

COMPROMISE AND SETTLEMENT — ESTOPPEL — EQUITABLE ESTOPPEL —SETTLEMENT OF CLAIM—EFFECT.

Plaintiff, claiming that salary was due him as president of defendant and superintendent of its factory, drew checks on defendant's bank account on which he obtained the money but which defendant, through its proper officer, instructed the bank not to charge to its account. Subsequently he sold his stock in the company to defendant for a stipulated sum on which he agreed to accept the amount of the checks as part payment. After full payment for his stock had been made he made a claim for the salary represented by the checks. *Held*, that he was estopped to claim that the matter of his salary was not settled at the time of the sale of his stock.

Error to Kent; Perkins, J. Submitted February 15, 1907. (Docket No. 145.) Decided October 4, 1907.

Assumpsit by John A. Hodges against the Valley City Desk Company for services rendered. There was judgment for plaintiff, and defendant brings error. Reversed, and judgment entered for defendant.

L. E. Carroll, for appellant.

Hugh E. Wilson (*Richard L. Newnham*, of counsel), for appellee.

McALVAY, C. J. Plaintiff recovered a judgment against defendant company for 20 weeks' salary as superintendent of its factory. The case was tried before the court without a jury and the judge upon request in writing filed his findings of fact and conclusions of law, upon which judgment was entered for $998.33. The findings of fact and law made by the court are as follows:

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"1. The defendant company was incorporated in 1888, and the plaintiff was at that time elected president of the company, and was such officer continuously from that time until April 1st, 1901.

"2. In April, 1891, at a meeting of the directors of the company, George Corbin, one of the directors, moved that the plaintiff be appointed general superintendent of the factory, with power to hire and discharge all employés, and the motion was unanimously carried. That immediately after such appointment the plaintiff entered upon and performed the duties of superintendent, and continued to perform such duties until April 1st, 1901.

"3. The plaintiff's appointment as superintendent by the board of directors was never revoked prior to April 1st, 1901, but continued in force until that date.

"4. That several years prior to April 1st, 1901, the salary of the plaintiff was agreed upon between him and the company and fixed at the sum of forty dollars ($40.00) per week, and he received a salary of forty dollars ($40.00) per week from the time of that agreement up to and including the week ending November 10th, 1900. That the salary of the plaintiff was the same salary received by Alonzo N. Hodges, who was the secretary and treasurer of the company during all the time that the plaintiff was president and general superintendent.

"5. That on November 17th, 1900, and on November 24th, 1900, the bookkeeper, one Buell, put up in envelopes the salary of the plaintiff for the weeks ending November 17th and 24th, in the customary manner, but that the same was not paid over to the plaintiff, and that some time between November 24th and December 1st, 1900, Alonzo N. Hodges informed said Buell that he was to discontinue the payment of salary to the plaintiff.

"6. That the plaintiff after November 10th, 1900, continued in the employ of said company as general superintendent until April 1st, 1901, a period of twenty (20) weeks.

"7. That from November 10th, 1900, to April 1st, 1901, a period of twenty (20) weeks, the plaintiff received no salary from the defendant.

"8. I find as a matter of law that the plaintiff is entitled to recover from the defendant the sum of forty dollars ($40.00) per week for twenty (20) weeks, together with five (5) per cent. interest thereon, from April 1st,

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1901, to date, which I find to be the sum of nine hundred ninety-eight and 33-100 dollars ($998.33).

"Dated March 19th, 1906.

"WILLIS B. PERKINS,
"Circuit Judge."

Amendments to these findings were offered and denied and exceptions taken. Several errors are assigned, only two of which are urged in defendant's brief:

1. That plaintiff was estopped by his conduct from maintaining his suit.
2. That the court erred in finding that plaintiff after his appointment as superintendent continued to perform those duties until April 1, 1901.

The plaintiff and others had conducted this business as a copartnership up to the time of its incorporation in 1888. He was then elected president and in May, 1890, was elected superintendent. He claims that he held both of these positions until he sold his stock in April, 1901. Some time after the incorporation plaintiff and his nephew and the nephew's wife acquired all the stock of defendant company. They were all actively engaged in the business and entered into an agreement in writing that as long as they held the stock plaintiff should continue to be elected as president and director each year, and plaintiff was to receive the same salary as the nephew, Lon. N. Hodges, who was secretary and treasurer, such salary to be not less than $1,500 per year, and he was to give his time to the services of the company. The salaries were finally increased to $40 per week to each, and were never afterwards changed.

The basis of the claimed estoppel rests upon the acts and conduct of plaintiff at the time he sold out his stock on or about April 1, 1901. Some dispute had arisen because Lon. N. Hodges on November 10, 1900, ordered the salary of plaintiff stopped, and plaintiff, being refused further salary, finally, on March 14th and 16th, drew two checks, amounting to $450, signed by him as president, and drew the money to apply on his salary. Lon. N. Hodges, who

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had always drawn the checks, claiming that the payment of these checks was unauthorized, informed the bank not to charge them on defendant's account. Arrangements were made whereby others took an interest in the corporation, and plaintiff, having been deposed as president, contracted to sell his stock to the company for $5,000. At the time of the transfer the matter of these checks was discussed. The amount of the checks was finally included in the transaction. The testimony conclusively shows that defendant understood, and plaintiff intended it should understand, that the purchase of his stock for $5,000 by defendant settled any claim on his part for back salary. It is undisputed that defendant insisted throughout that plaintiff was not entitled to any salary after November 10, 1900, and refused to pay him. It is undisputed that plaintiff claimed that he was entitled to salary up to the time of his removal as president. It is undisputed that plaintiff sought to pay himself a portion of his back salary in March, 1901, by means of two checks signed by him as president, upon which he collected $450, which he applied upon his alleged salary account. It is undisputed that defendant refused to recognize the checks and notified the bank not to charge them to defendant's account. It is undisputed that plaintiff, although at the time he sold his stock claiming he was entitled to salary, surrendered his claim to retain the amount of back salary represented by the checks and accepted the obligation of defendant upon the checks as part of the consideration for the purchase of his stock.

Plaintiff testified:

"At the time I sold my stock I made the claim that they owed me on salary. * * * These checks were connected with the purchase of the stock by them from me. I suppose they were part of the payment for the stock; that is the way the company construed it I suppose; I did not construe it in that way; there was a controversy over the checks at the time and Mr. Van Hoff who paid me the money on the checks, and was quite liable to lose his position at the bank; there was a great deal of feeling in

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the matter, and the checks were objected to, and under these considerations and through the influence of Mr. Graham, who was then vice-president of our company, I allowed them to take that amount out of the purchase price for the stock. * * * I received for the stock $1,000.00 in cash, eight notes for $400 each and one note for $350.00, making a total of $4,550. The consideration stated in this agreement as $5,000 is not correct. The consideration was $4,550. * * * I never gave any receipt, acknowledgment or waiver to the company of my claim for unpaid salary. The reason that I drew these checks was because I was advised by my attorney to get what money I had coming, if I could get it, in any way or manner; that I was entitled to it. The purchase price of my stock at $5,000 which was bought by the company was made up of these checks of $450, $1,000 in cash, eight notes for $400 each and one note for $350. * * * My attorney told me that I was perfectly entitled to the money for my salary and would be entitled to get it in any way I could; that is, the money I had coming or claimed I had coming. I had asked for my salary at the office, and they had refused to pay it. * * * I thought I had perfect authority to draw it, I had never drawn or signed any checks before for the company. I won't say that these were the only checks that I ever signed for the company. I know I signed a great many notes. I did not consider that I had no authority to sign checks as president of the company. I supposed I had, I was so advised.

"*Q.* Don't you know that according to the by-laws and according to the custom and practice, and the order of the bank, that Lon. N. Hodges was the only one who drew any checks.

"*A.* No, sir. I have signed a great many notes and contracts for the company, or rather indorsed the notes. * * * I drew those checks for the purpose of getting my salary, to get the money, I needed it; I had been to the company and demanded my pay, it was on the instructions of my attorney that I did. I don't know when I first made a claim to the company for my salary. * * *

"*Q.* If you knew that you had something coming to you, why didn't you insist upon retaining that $450.00 at that time instead of allowing it to go in payment for your stock?

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"*A.* Through the influence of Mr. Graham and Mr. Van Hoff, and my attorney rather thought it would be all right to do that and try and collect it later."

Plaintiff received $450 of defendant's money on the checks, $1,000 in cash and notes aggregating $3,550, making $5,000 which he actually received for his stock. The $450 represented salary and nothing else. Plaintiff agreed to accept the money which he had collected on his alleged salary account—and which he was entitled to keep, if he was entitled to salary—as a part payment for his stock, with an undisclosed intention to try to collect salary afterwards. The surrender of part of his salary, in accordance with defendant's contention that he was not entitled to salary, is inconsistent with his present claim, was acted upon by defendant, and he should be held to be estopped from now asserting the claim. Plaintiff received payment of the last note in January, 1902, and in May, 1902, he sent defendant a bill for his salary. For the reasons above indicated the court was in error in not finding that plaintiff was by his conduct estopped from recovering in this suit.

The judgment is reversed and a judgment will be entered in favor of defendant and against plaintiff, with costs of both courts.

CARPENTER, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

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TALCOTT v. FREEDMAN.

1. SALES—CONTRACT—MODIFICATION.
   Where a contract for the sale of goods is entered into by means of an order for the same and an unconditional acceptance thereof, subsequent correspondence between the parties concerning payment, and relative to the buyer's credit, no agreement being reached, is ineffectual to modify the contract so as to relieve the seller of the duty of shipping all the goods as agreed.

2. SAME—CONSTRUCTION—QUESTION OF LAW.
   The construction of letters depended upon to modify a contract is a question of law for the court and it is error to submit the same to the jury.

3. SAME—FAILURE TO PERFORM—DAMAGES.
   The measure of damages for failure to supply goods procurable in the open market is the additional cost to the buyer; but, if the goods are not obtainable, the buyer is entitled to recover the profits lost through the fault of the seller.

4. SAME—EVIDENCE—ADMISSIBILITY.
   In an action for damages for failure to supply goods as agreed, the buyer is entitled to show what efforts he made to procure the goods in the open market, by correspondence and otherwise.

5. SAME—INSTRUCTIONS.
   In an action for damages for failure to supply goods as agreed, evidence as to a fire which occurred in the buyer's store several months after the transaction is immaterial, and it is erroneous and prejudicial for the court to refer to it in the charge as an "important factor" in the termination of the buyer's business.

Error to Wayne; Donovan, J. Submitted February 18, 1907. (Docket No. 14.) Decided October 4, 1907.

Assumpsit by James Talcott against Louis Freedman, Ephraim M. Love, David R. Love, Harry Love, and Henry Rosenthal, copartners as Freedman, Love & Com-

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pany, for goods sold and delivered. There was judgment for plaintiff, and defendants bring error. Reversed.

Sloman & Sloman, for appellants.

Bowen, Douglas, Whiting & Murfin, for appellee.

MCALVAY, C. J. Plaintiff sued defendants, copartners, for certain goods sold and delivered under a contract which was entered into between the parties contained in certain letters introduced in evidence. This is the second time the case has been before this court. On the first trial a verdict was directed by the trial judge against defendants on the ground that no contract was shown between the parties which would authorize recoupment. The judgment entered upon such verdict was reversed, and a new trial ordered. 140 Mich. 32.

Upon the second trial it was claimed that the correspondence showed that a change was made in the contract entered into, which relieved plaintiff from delivering the entire amount of goods purchased. The facts in the case and all the letters relied upon are found in the former decision of the court, to which reference is had. In that decision it was held that a contract existed between the parties, for a breach of which damages might be recovered. See former opinion and cases cited.

The claim of plaintiff that a change had been made in this contract by the letters dated November 22, November 26, November 28, and December 2, 1902, is not tenable. The most that can be said of the letter from plaintiff of the date of November 22d, is that it was a proposition to change the agreement, and the answer of defendants dated November 26th, was a counter proposition. No change was agreed upon between the parties. The question of the construction of these writings was a question of law for the court. The court erred in submitting the question to the jury. The only question for the jury to determine in the case was the question of the damages, if any, sustained by defendants, on account of the failure of

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plaintiff to deliver the balance of the goods purchased.

In the former opinion the court indicated that the correct rule for the measure of damages in this case, was that laid down in the case of *F. W. Kavanaugh Manfg. Co.* v. *Rosen*, 132 Mich., at page 48. In that case the court said:

"The rule of damages in case they were able to procure the goods in the open market would be the additional cost to them; but, if the goods were not obtainable, defendants would be entitled to recover the profits lost through the fault of plaintiff." Citing *Den Bleyker* v. *Gaston*, 97 Mich. 354.

The court should have so charged upon the question of damages. The charge as given was erroneous.

Defendants were entitled to show what efforts they made to procure these goods in the open market, whether by correspondence or otherwise, and the court was in error in excluding evidence tending to show that fact.

The contract is silent as to the place of delivery of the goods. Upon the record before us the question is immaterial. Plaintiff, upon demand, refused to deliver the balance of the order, and defendants' proof tended to show that the goods could not be obtained on the open market. The evidence as to the fire which occurred in defendants' store several months after this transaction was wholly immaterial and the court so held. Reference to it in the charge, as an "important factor" in the termination of defendants' business was erroneous and prejudicial.

The judgment is reversed, and a new trial granted.

CARPENTER, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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PEOPLE *v.* WOLVERINE MANUFACTURING CO.

JUDGES—DISQUALIFICATION—MOTION FOR CHANGE—DISCRETION.

On certiorari to review a judgment of the recorder's court of Detroit, the error relied upon was the denial of a motion that the presiding judge assign the cause for trial before another judge of that court or before one of the circuit judges, on account of his bias, prejudice, and interest. The movant relied entirely upon a newspaper article purporting to be based upon an interview with the judge, but there was no proof that the statements in the article were actually made, and the judge in denying the motion said he was not prejudiced, and nothing occurred at the trial indicative of prejudice. *Held*, that no abuse of discretion was shown.

Certiorari to the recorder's court of Detroit; Phelan, J. Submitted April 8, 1907. (Docket No. 26.) Decided October 4, 1907.

The Wolverine Manufacturing Company and the Cadillac Cabinet Company were convicted of obstructing a street, and sentenced to pay a fine of $25. Affirmed.

Keena, Lightner & Oxtoby, for appellants.

Denton Guinness, for the people.

MCALVAY, C. J. Defendants, Michigan corporations, were complained against early in 1904 and charged with the obstruction and incumbrance of Thirteenth street (later called Vermont avenue), in the City of Detroit, on May 17, 1904, by placing a fence across said street, putting buildings, brick and other material therein, thereby entirely closing said street to the public from Stanley street to the railroad, contrary to the provisions of section 1, chap. 55, p. 154, revised ordinances of said city of 1895.

The case was first tried in the recorder's court before Judge Phelan, associate recorder, on June 23, 1904, and

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respondents were found guilty and fined $25. The case was removed to this court on certiorari, reversed, and a new trial granted. 141 Mich. 455. The second trial was had before the same court and judge on December 26 and 27, 1905. Upon this trial, before a jury was called, respondents made and filed the following motions and plea:

1. A motion to cite a certain reporter to show cause why he should not be punished for contempt for publishing a certain alleged interview with the judge relative to this case.
2. A motion that the presiding judge assign the cause for trial before another judge of that court or before one of the circuit judges, on account of his bias, prejudice and interest.
3. A plea puis darrien continuance, setting up that the proceedings were barred by the vacation of this portion of Thirteenth street, December 5, 1905, by a decree of the Wayne circuit court.

The court took the first motion under advisement, denied the second, and also took the plea under consideration. Thereupon counsel for respondents excepted to the rulings of the court and withdrew from the case and took no further part in it. The case then proceeded to trial. A jury was regularly and duly selected, which, after hearing the evidence and the charge of the court, returned a verdict of guilty against respondents. The judgment of the court was a fine of $25 and costs amounting to $20. The case is again here upon writ of certiorari.

Before discussing the error respondents rely upon, it will be well to state a few facts appearing in the record, which probably account for the disagreement between the judge and counsel for respondents. On November 2, 1905, after the case had been decided in this court, respondents filed a bill of complaint in the Wayne circuit court, in chancery, against the city of Detroit, the corporation counsel, and the complainant in this case, asking for an injunction restraining them from proceeding in the recorder's court with the new trial of this case which had been granted by this court. The injunction

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was granted by Judge Donovan. On the same day the owners of the plat which includes that portion of this street in controversy, filed in the same court a petition to vacate a part thereof. On December 5, 1905, a decree was signed by Judge Donovan granting said petition, and vacating a part of said plat, which included the portion of the street in this suit where the same was charged to be obstructed by respondents. The newspaper article relied upon to show the bias, prejudice, and interest of the trial judge was printed in the Detroit News, December 20, 1905.

The only one of the errors assigned which is discussed before us in the brief for counsel for respondents, relates to the disqualification of the judge to preside at the trial of the case. The ground for this motion is the affidavit of counsel for respondents who relies entirely upon the contents of the newspaper article of December 20th above referred to. There is no proof that the statements therein contained were actually made. From the article it appears that a controversy had arisen on account of the injunction issued restraining the municipality and its officers from going on with the new trial ordered in the case. Apparently it was intended to delay the prosecution of this case until the decree in the Wayne circuit court could be obtained vacating this street.

The questions which were sought to be raised in this case by the plea puis darrien continuance based upon the decree vacating the plat are not urged in this court. Whatever Judge Phelan may have said under provocation, in regard to those proceedings, is immaterial.

Under the statute, if he had desired, the judge might have requested a circuit judge or an associate justice of this court to preside. This was a matter of judicial discretion with him. Our attention is not called to any statute which provides for a change of venue from the recorder's court, nor is there any provision requiring the judges he might request to preside to comply with such request.

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It remains to be determined, then, whether, in proceeding to try the case, the court was guilty of an abuse of judicial discretion. In his opinion in ruling upon this matter the court said:

"I desire to state further to the counsel that this court is not prejudiced; that the law has been passed upon, and the question of fact, the question of user or nonuser is a question for the jury; and the court is not biased, the court is not prejudiced either against counsel or his clients."

Nothing which occurred later during the trial is pointed out as indicative of the disqualification of the trial judge. The court in overruling the motion asking for a trial before another judge held that no sufficient showing had been made, and that no necessity demanded such action. In so holding and proceeding to try the case he was not guilty of an abuse of his judicial discretion.

The conviction is affirmed.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ. concurred.

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BENSON *v.* BAWDEN.

1. CONTRACTS—ILLEGALITY—PURCHASE OF OFFICIAL INFLUENCE.
   A contract by a postmaster of a post office of the third class, by which he agrees to remove the post office to a certain building and maintain it there during his term of office, in consideration of certain office fixtures, is illegal, as against public policy.

2. SAME—PARTIES IN PARI DELICTO.
   The law will not aid either party to an illegal agreement, but will leave them where it finds them.

3. SAME—ASSIGNEE OF ILLEGAL CONTRACT.
   The assignee of a party to an illegal contract cannot recover back property parted with by his assignor under the contract.

4. APPEAL AND ERROR — QUESTIONS CONSIDERED — QUESTION NOT RAISED BELOW.
   In an action by the assignee of a party to an illegal contract to recover back property parted with under the contract, a claim in this court, not made below, that the sale of the property to him was a rescission of the contract, will not be considered.

5. SAME—WRONG REASON FOR CORRECT DECISION.
   Where plaintiff in trover cannot exhibit his case without presenting an illegal contract, as to which the parties are in pari delicto, a judgment for defendant will not be reversed, though the verdict was directed for defendant on the ground that, under the contract, he had title to the property.

Error to Gogebic; Shepard, J., presiding. Submitted April 10, 1907. (Docket No. 44.) Decided October 4, 1907.

Trover by Signa M. Benson against Richard J. Bawden, Jr. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

C. F. Button, for appellant.

Herb M. Norris, for appellee.

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McALVAY, C. J. This is an action in trover brought by plaintiff to recover the value of certain chattels, being post-office furniture and fixtures. There appear to be no disputed facts in the case. In 1897 defendant had been appointed postmaster for the city of Bessemer by the proper authorities of the Federal government. This post office was one of the third class. Under defendant's predecessor, Levi S. Rice, it had been kept in what was known as the Bersbach block. Plaintiff's assignor, K. S. Markstrum Company, a corporation, desired to have this post office removed and located in the Picken building, in the city of Bessemer, near which it was conducting a general merchandise store. This company on July 30, 1897, purchased the property in dispute from Mr. Rice, the retiring postmaster, who, under its instruction, delivered the same to defendant. On the same date these chattels had been transferred to defendant by plaintiff's assignor under the following agreement:

"BESSEMER, MICH., July 30th, 1897.

"This is to certify that for and in consideration of one dollar to me in hand paid, as agent and manager for the K. S. Markstrum Co., a corporation, I have this day sold and transferred to R. J. Bawden, Jr., all fixtures, paraphernalia, now belonging to and part of the post-office outfit of the Bessemer post office, and now in my custody and possession.

"The condition of this sale being as follows:

"The said R. J. Bawden, Jr., having been appointed postmaster of the city of Bessemer, State of Michigan, agrees and binds himself to remove the said post office to the building on Mary street and to the room formerly occupied as post office in the John Picken building, on said street, and to continue the maintenance, location and occupancy of said room in the said John Picken building as the post-office quarters for said city, for the term of four years from the first day of July, 1897, and to maintain said fixtures, for such post-office purposes, in as good condition as they now are, reasonable and unavoidable wear and tear excepted; when each and all of these conditions are fulfilled, and all here stipulated obligations complied with, said post-office fixtures become the uncon-

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ditional property of the said R. J. Bawden, Jr., but otherwise they are and remain the property and purtenances of the said K. S. Markstrum Company, and be taken possession of by them any time the conditions as above agreed to are violated or denied.

"It is understood and agreed that if the said R. J. Bawden, Jr., should, by reason of change in the administration at Washington, or from any other cause not justly chargeable to his own negligence or misconduct, be removed from said postmastership before the four years as here stated expire, then such failure to keep said office the stipulated four years will cause no failure in his right and title to said fixtures.

"K. S. MARKSTRUM CO.,
"By K. S. MARKSTRUM, Agent.
"R. J. BAWDEN, Jr."

The post office was removed to the John Picken building and there maintained by defendant for the term of more than four years after July 1, 1897. Plaintiff derives title by sale from K. S. Markstrum Co., January 5, 1900. Demand for delivery of the property was made for her January 5, 1903, upon defendant who was in possession of it using it as postmaster.

The court at the request of defendant directed a verdict of not guilty, as follows:

"I charge you as a matter of law that it appears from the testimony, undisputed, that defendant in this case has purchased the property in dispute, and that it was his at the date of the alleged conversion. You will retire to your room and bring in a verdict of not guilty."

It is insisted that the court erred:

1. In admitting the contract in evidence.
2. In directing a verdict for defendant.

The objection to the admission of the contract was that it was against public policy and void on its face, and therefore incompetent. This postmaster had received property claimed now to be of the value of $800, for the sole purpose of securing the location of the post office at a certain place desired by plaintiff's assignor, and entered into an agreement in writing that he would do so, and maintain the

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office there for four years. In case of a removal of a post office the Federal postal laws and regulations provide for an application to be made to the proper officer and division wherein "the postmaster must state * * * the distance and direction of the proposed site from the one occupied; whether such change is satisfactory to the patrons of his office, and whether the cost of transportation of the mails will be increased." Postal Laws and Regulations (1902), § 267, subd. 2. The postmaster must exercise his official judgment. He should be disinterested. That he may be hired to act in the interest of any individual is shocking to a decent sense of propriety.

No comment is necessary on our part to emphasize the fact that this agreement cannot be defended upon any theory. The plaintiff claims that such trafficking in official influence cannot be tolerated, and that an affirmance of the judgment would give all the postmasters in Michigan, in locating office sites, license to sell their official influence to the highest bidder. Defendant urges that if the contract was illegal the parties are in pari delicto and no recovery can be had. The court is able without difficulty to agree with both parties as to the illegality and viciousness of this transaction; but the regulation and supervision of such matters is for the consideration of the Federal authorities. It is well settled that the law will not aid either party to an illegal agreement. It leaves the parties where it finds them. Neither a court of law or equity will aid the one in enforcing it, or give damages for the breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. 9 Cyc. p. 546 et seq., and cases cited; *Walhier* v. *Weber*, 142 Mich., and cases cited on p. 325.

By this suit plaintiff is in effect asking the aid of the court to recover back property parted with under an illegal agreement. She is in no better position than her assignor and in asking the court for the value of the prop-

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erty claimed to have been converted is unable to exhibit her case without presenting to the court the question of the illegality of this contract. It was no error for the court to admit the contract in evidence. *Walhier* v. *Weber*, 142 Mich. 322.

The claim of plaintiff that the sale to her by the K. S. Markstrum Co. was a rescission of this contract will not be considered, as it appears to be raised for the first time in this court.

These parties are equally in the wrong and the court will leave them where it finds them. The trial court in directing a verdict for defendant was not in error, although he gave a wrong reason for such action. The result was correct.

The judgment is affirmed.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

DETROIT LEATHER SPECIALTY CO. *v.* MICHIGAN CENTRAL RAILROAD CO.

EMINENT DOMAIN — RAILROADS — NECESSITY OF COMPENSATION — PRIVATE WAY.

By the term "private way," used in section 6284, 2 Comp. Laws, is meant all private ways, however created, and not merely roads laid out as private roads under statutory provisions; and where a deed conveying land contains also a grant of "right of way for all purposes for which a public alley can be used, over a strip of land" adjoining the land conveyed, a railroad company purchasing the strip with full notice of the prior grantee's rights cannot build a track along the strip without first compensating such grantee.

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Appeal from Wayne; Rohnert, J. Submitted April 12, 1907. (Docket No. 72.) Decided October 4, 1907.

Bill by the Detroit Leather Specialty Company against the Michigan Central Railroad Company and others to restrain an encroachment upon a private right of way. From a decree dismissing the bill, complainant appeals. Reversed, and decree entered for complainant.

Bethune Duffield, for complainant.

N. E. Slaymaker and *Gray & Gray*, for defendants.

MCALVAY, C. J. Complainant, a Michigan corporation, purchased from George L. Beecher, December 15, 1900, a certain part of an unplatted portion of what was known as the Brevoort farm in the city of Detroit, described by metes and bounds, "together with the right of way for all purposes for which a public alley can be used, over a strip of land twenty (20) feet in width next adjoining the above-described land on the westerly and northerly sides thereof." Complainant agreed to pay $2,500 for said property, and erect thereon a building worth $5,000. It immediately went into possession of the premises, erected the factory, and has ever since possessed, maintained, and operated the same. Prior to this purchase, another parcel of this land, 40 feet wide and 130 feet deep, next adjoining along the entire southerly line of complainant's land, had been sold to other parties.

On August 29, 1902, Beecher and wife conveyed to defendant Michigan Central Railroad Company a strip of land running from its right of way on the south, northerly, and in its course passing over the entire length of complainant's right of way on the west side of its property, and including the whole of it, to be used for a railroad right of way, for the purpose of constructing thereon a side track for railroad purposes. Said quitclaim deed recited that "the northerly 204 feet of said strip being

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subject to an easement for all purposes of a public alley in favor of the owners and occupants of the premises adjoining the same." Said right of way was granted subject to certain agreed terms as to the time the side track should be constructed. Upon southern portions within 60 and 90 days, "and upon the remainder of the right of way, to wit, the said northerly 204 feet thereof, upon the surrender and abandonment by the owners and occupants of the premises adjoining the same of their said easement." This 204 feet at the northerly end is that portion of the right of way passing along immediately west of complainant's premises and the parcel 40 feet wide joining it upon the south, and which covers the entire right of way west of its property which it acquired by purchase from Beecher.

In November, 1902, Beecher recorded a plat of these premises. Upon this plat complainant's premises are identical with lot 19. A strip 20 feet wide is laid off back of it. On this strip south of the north 204 feet is printed "M. C. R. R. land. Not included in plat." On the north side of complainant's premises is a public alley 20 feet wide.

Without notice to complainant, some of defendants on May 3, 1906, began to take proceedings to get permission to construct a side track across the public alley last named, and on June 28, 1906, without permission or any agreement between complainant and any of defendants, and without taking any proceedings to acquire complainant's rights in its private way, began to lay a track in the center thereof west of complainant's premises extending northerly along and past its premises and across the alley to the north thereof.

The bill of complaint in this case was filed June 30, 1906, and a temporary injunction issued restraining defendants from further constructing said track or using the same. The bill prays for a permanent injunction and for general relief. There is no dispute as to the material facts of the case. Upon a hearing in the circuit court a

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decree was granted dissolving the injunction; the relief prayed for was denied, and the bill dismissed.

Complainant upon its appeal from such decree contends that its property has been taken without due process of law; that under the Constitution and laws of Michigan private property cannot be taken by a steam railway without lawful condemnation and compensation therefor; and also that defendant railroad company is estopped from constructing its road because of the covenant in its deed from Beecher. The contention of defendants is that the railroad company is the owner of this strip of land subject to the easement of complainant, and has the right to use the same for any purpose that an owner of an unincumbered fee could make use thereof; provided they do not unreasonably obstruct complainant's easement.

We cannot agree with this proposition. Defendant railroad company is a public corporation, and the use to which it seeks to subject the right of way of complainant is for the purposes of a steam railway. It is not necessary for us to discuss or decide whether or not defendant's position would be tenable were this dispute between private owners of interests similar to those of these parties. It is admitted that complainant has vested rights in this easement or private way, but urged that it has not been ousted of such rights by the construction of a steam railway along such way. There is also no question but that defendant railroad company had full notice of complainant's rights. It is urged that the provisions of the general railroad law (2 Comp. Laws, § 6234) do not apply to ways of this kind, but that the term "private road," as used, applies only to such as are established under statutory provisions. Section 6234, 2 Comp. Laws, subd. 5, among other things, provides:

"But such railway shall not be constructed upon any public street, lane, alley, highway or private way until damages and compensation be made by the railroad company therefor to the owner or owners of property adjoining such street, lane, alley, highway or private way, and

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opposite where such railroad is to be constructed, either by agreement between the railroad company and each owner or owners, or ascertain[ed] as herein prescribed for obtaining property or franchises for the purpose of its incorporation to be paid to the owner thereof, or deposited as hereinafter directed."

Taking the use of the term "private way" in the above quotation in connection with the words "public street," "lane," "alley," "highway," which it immediately follows as the last of the different ways mentioned, we cannot but say that the legislative intent is clear that no statutory road was intended, as defendants argue. The legislature evidently intended to include all private ways within the provisions of this subdivision of the section. Giving this construction to this later provision of the subdivision, we find that in order to give harmonious construction to all of it, the term "private road" used in the first sentence was not intended to be restricted in meaning to those roads laid out as "private roads" under statutory provision; but to include all private roads and ways however created. The right of way in dispute would be a "private way" within the terms of this statute. It follows that the defendant without right entered upon this private way and proceeded to build and operate its railroad. Complainant was correct in contending that this could not be done without compensation or condemnation. The decree of the court below is reversed, with costs of both courts, and a decree will be entered perpetually enjoining defendants from entering upon said way for the purpose of building, using, and operating a railroad, and ordering defendant Michigan Central Railroad Company to remove all its rails, ties, switches, and all other materials placed thereon by it from the strip of land 20 feet wide adjoining said lot 19 on the west, and also to remove all such material from what is now known as a public alley northerly from the northwest corner of lot 19 and within the limits of the grant of this right of way from Beecher to complainant; all to be removed within

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20 days after notice of said decree, and also within the same time to restore the said right of way to the same condition as when entered upon by said defendant, unless condemnation proceedings be sooner instituted.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

BUNN v. KERNEN.

CONTRACTS — SALE OF BUSINESS — AGREEMENT NOT TO RESUME — INJUNCTION AGAINST VIOLATION — EVIDENCE — SUFFICIENCY.

On a bill to enjoin the violation of an oral agreement not to re-engage in a certain business, alleged to have been made at the time of selling defendant's business to complainant, and for an accounting for damages, evidence examined, and *held*, that the oral agreement relied upon was not proven.

Appeal from Gratiot; Searl, J. Submitted April 15, 1907. (Docket No. 104.) Decided October 4, 1907.

Bill by Charles Bunn against John W. Kernen to restrain the continuation of a certain business, and for an accounting. From a decree dismissing the bill, complainant appeals. Affirmed.

Julius B. Kirby, for complainant.

John T. Mathews, for defendant.

MCALVAY, C. J. Appeal in chancery from a decree in favor of defendant denying complainant relief, and dismissing his bill of complaint. Complainant was engaged in the ice business in the village of Ithaca, Michigan. Defendant and his brother, known as Kernen Brothers, were en-

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gaged in the same business. Mr. W. J. Clark, an agent of complainant, opened negotiations for the purchase of the ice business of Kernen Brothers. These negotiations terminated in a sale and transfer to complainant for a consideration of $1,000. Of this purchase price $50 was paid January 10, 1904, when the terms of the sale were agreed upon, and the balance, $950, on January 20th following, when the writings between the parties were drawn and delivered. These writings consisted of a deed, a bill of sale, and a reservation of the use of cold storage. They were made directly to Clark as security to him for indorsing for complainant to procure cash to pay defendant. Clark afterwards transferred to complainant. Afterwards during the year defendant again engaged in the ice business at Ithaca, and complainant filed the bill in this case against him, praying for an injunction to restrain him from continuing and engaging in any way in the ice business in Ithaca and vicinity, and for an accounting to complainant for damages on account of again entering into said business; complainant alleging that at the time of his purchase of defendant's business, in consideration of the money paid as aforesaid, defendant orally agreed not to engage again in the ice business at Ithaca.

The case was heard in the circuit court, and relief denied on the ground that the oral agreement relied upon was not proven. A rehearing was granted and the same decision was made. The question to be decided is one of fact. A careful examination of all the evidence in the case shows that the writings between the parties make no mention of the claimed agreement, and the testimony in the case does not establish it. To set forth this evidence, written and oral, will be of no benefit to the profession. We agree with the circuit judge in denying complainant the relief prayed, and dismissing the bill of complaint.

The decree is affirmed, with costs.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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CLEMENT v. ROMMECK.

149 595
s157 644

NEGLIGENCE — SALE OF DANGEROUS SUBSTANCES — LIABILITY OF RETAILER.

A merchant who buys in the open market a stove polish which purports to be safe and proper for use, and sells the same for the purpose for which it is apparently intended, is not liable, in the absence of negligence, if it turn out that the polish is not adapted to the proposed use, but on the contrary is inflammable and explosive, and causes injury.

Error to Wayne; Murphy, J. Submitted June 4, 1907. (Docket No. 6.) Decided October 4, 1907.

Case by Alice D. Clement against Arthur O. G. Rommeck, impleaded with Crosby & Company, for personal injuries. There was judgment sustaining a demurrer as to defendant Rommeck, and plaintiff brings error. Affirmed.

James H. Pound, for appellant.

MONTGOMERY, J. This case was brought to recover damages for an injury sustained by plaintiff while using a stove polish manufactured by defendant Crosby & Co. and sold to plaintiff by defendant Rommeck. Both defendants demurred to the plaintiff's declaration. The demurrer was sustained as to defendant Rommeck and overruled as to defendant Crosby & Co. Crosby & Co. brought the case here and the order overruling its demurrer was sustained. *Clement* v. *Crosby & Co.*, 148 Mich. 293. The plaintiff has now brought the case here to review the order and judgment sustaining the demurrer of defendant Rommeck.

The declaration alleges that plaintiff is by occupation a housekeeper, and, having occasion to polish up her gas range, did so with a preparation she had been solicited to buy from defendants. The declaration alleges that the

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preparation was "compounded, made, prepared, and put upon the public market in Detroit by a corporation known as Crosby & Co., one of the defendants herein, and upon which product defendants invited public use by the following solicitations, which they placed upon the goods when prepared for sale in the open market." (Here follows the recommendation of the preparation for use when polishing gas ranges, stoves, etc.)

The declaration avers that the preparation was sold to her agent by the defendant Rommeck without any warning of the dangerous nature of the preparation; that as a matter of fact it is a highly inflammable, volatile, and dangerous mixture, liable to ignite by spontaneous combustion, and that as a matter of fact it did ignite when being properly used, and caused serious injury to plaintiff.

The duty that is averred in the declaration is as follows:

"It then and there became the duty of the defendants, and each of them, to know the property and properties of the goods manufactured and sold by them, and that they should not manufacture and sell, both or either of them, dangerous and highly inflammable substances," etc.

The plaintiff averred that she was in nowise negligent in the use of said product or of the said product of the defendant, known as Crosby & Co., a Michigan corporation, and known and called 6–5–4, which it manufactures, and which was sold to her in the ordinary course of trade by the defendant Arthur O. G. Rommeck, and that she, plaintiff, was in nowise blamable for her own injuries, but she now here avers and charges the fact to be that the negligence, carelessness, and wrongdoing of the defendants in the manufacture and placing upon the public market for sale without notice of its dangers of such a highly inflammable and dangerous product as the composition known as 6–5–4 is and proved itself to be to plaintiff without any warning of its dangerous qualities and characteristics and the said article being sold in the open

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market was and is the direct cause of the plaintiff's injuries.

It is manifest from a reading of this declaration that the theory fairly to be deduced from it is that, though the defendant Rommeck bought the preparation from Crosby & Co. properly labeled in the open market and sold it in the open market, the positive duty rested upon him to know the property of the goods and their inflammable nature and to communicate the facts to the purchaser. It is to be noted that the declaration contains no averment that the defendant Rommeck had actual knowledge of the inflammable nature of the goods, nor is it averred in what manner he was negligent in not knowing their inflammable nature. It gets down to this, whether a dealer, a hardware merchant, for example, who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which it is apparently intended, is liable in the absence of negligence if it turn out that the article is not adapted to the use, and causes injury.

We think it clear upon principle that no such liability exists. It is sought to liken the case to the sale of an article of food in which it is held that the sale to the consumer carries with it an implied warranty of the wholesomeness of the food. *Craft* v. *Parker, Webb & Co.*, 96 Mich. 245 (21 L. R. A. 139); *Hoover* v. *Peters*, 18 Mich. 51. We are not aware that the rule of these cases has been extended to the sale of commodities like stove polish. On the contrary, we think that the principle stated in *Brown* v. *Marshall*, 47 Mich. 576, is analogous, and that negligence must of necessity be the basis of an action in such a case. The plaintiff may in such case proceed against the manufacturer, as we held in *Crosby's Case*, supra.

Judgment is affirmed, with costs.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

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HOPKINS *v.* ORMSBY.

CANCELLATION OF INSTRUMENTS — DEEDS — INCOMPETENCY OF GRANTOR—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

On a bill to set aside a deed of land on the grounds of the mental incompetency of the grantor and of the undue influence of the grantees, evidence examined, and *held*, to support a decree for the complainant.

Appeal from Benzie; Chittenden, J. Submitted June 4, 1907. (Docket No. 15.) Decided October 4, 1907.

Bill by Ada J. Hopkins, administratrix of the estate of Sampson P. Jaquith, deceased, against William Ormsby and Eliza Ormsby to set aside a deed. From a decree for complainant, defendants appeal. Affirmed.

D. G. F. Warner, for complainant.

Louisell & Nevius (*P. C. Gilbert*, of counsel), for defendants.

MONTGOMERY, J. This is a bill originally filed by the guardian of Sampson P. Jaquith to set aside a deed of a 40-acre description of land made by Sampson P. Jaquith to the defendants on June 2, 1904, on the grounds of mental incompetency of said Jaquith and of undue influence exerted by defendants. After the filing of this bill Sampson P. Jaquith died. By stipulation the complainant, after being appointed administratrix of the estate of Jaquith, was substituted as complainant, the defendants saving any right of objection in the matter of defense. The case was tried in open court and decree rendered in favor of complainant and defendants appeal, and submit the case to the court with the discussion of two questions: *First.* Was Jaquith, on the second of June, when he executed the deed in question, mentally incompetent? *Sec-*

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ond. Does the testimony justify the conclusion of undue influence?

In the winter of 1903–4 Jaquith, who was then past 80 years of age, and who had for several years been living by himself on the premises in question, went to reside temporarily with his daughter, Mrs. Hopkins, in the village of Benzonia. He remained there until about the first of May, the defendants at the time, who lived upon an adjoining piece of property, looking after his stock on the farm. About the first of May, Jaquith returned to the farm and the defendants came to live in his house. Before that they had been working some of the land on shares. Under some arrangement for continuing to work the land they became one family. On the second day of June he deeded the land in question for the stated consideration of $50 to the two defendants, and on the same day deeded another 20 acres to two sons of the defendants. The evidence shows that at the time this deed was made Jaquith was sick in bed. His brother who lived a half mile distant, and his daughter who lived in the village, were neither of them apprised of his illness or of the purpose to convey this land. A few days after the deed was made, word was conveyed to Mrs. Hopkins, his daughter and only heir, that her father was ill, and she visited him. She made a number of visits during June, her father getting better of his illness, but no information was conveyed to her either by her father or by defendants in relation to this deed, until about the 19th of July she saw a notice of its record in the county paper.

A good deal of testimony was given pro and con the mental competency of Sampson P. Jaquith at this date. It appears that very shortly after discovering this conveyance, application was made for the appointment of a special guardian and general guardian for Mr. Jaquith. A special guardian was appointed and later on a general guardian. The proceedings relating to this appointment are attacked, on the ground of irregularity amounting to jurisdictional defects. But we do not see how it is im-

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portant whether these proceedings were regular or irregular, as appellants' counsel very properly assume the questions involved relate to the validity of the transfer at the time it was made which preceded either appointment.

At the time this deed was made the scrivener who drew it testifies that none were present except himself and the Ormsby family, four of whom received an interest in the conveyance made at the time, and the fifth, a young girl, acting as a witness. The evidence as to what the consideration agreed upon was is very unsatisfactory. The recollection of the scrivener is very vague, and crediting him with entire honesty it may be said that his account of the transaction is of little value. We are satisfied that Jaquith was at this time in a debilitated state; that his mind was so weak as to admit of his being easily imposed upon; he had no counsel from any friend nor any person not interested against him; and there is testimony indicating a studied purpose of withholding information from his relatives and to poison his mind against his daughter. The consideration named in the deed was grossly inadequate, as was the consideration provided by a subsequently (some weeks after) executed life lease back to Jaquith of the same property conveyed by warranty deed.

The circuit judge who saw the witnesses reached the conclusion that this transaction ought not to stand. We think there is ample testimony in the case to justify the conclusion which he reached, and, in view of his better opportunity to judge of the credibility of the witnesses, we are not disposed to disturb the finding which he made.

The decree is affirmed.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

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BLISS v. CAILLE BROTHERS CO.

149 601
f155 *231
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149 601
s158 212

1. APPEAL AND ERROR — ASSIGNMENTS — DISQUALIFICATION OF JUDGE—SUFFICIENCY.

An assignment that the circuit judge erred in entering judgment and in hearing and determining motions to vacate the same when he was disqualified, by relationship with the plaintiffs, to do so, is sufficient in form to raise the question of the disqualification of the judge and the consequent invalidity of the judgment.

2. JUDGES—DISQUALIFICATION—RELATIONSHIP TO PARTY—EFFECT ON JUDGMENT.

Judgments and orders made by a judge who is disqualified by relationship to a party are not voidable merely, but are void, and subject to collateral attack.

3. APPEAL AND ERROR — ERRORS ASSIGNABLE — DISQUALIFICATION OF JUDGE.

The disqualification of the judge who entered a judgment, by reason of relationship to the plaintiff, suggested in this court after the return of the writ of error, is an error of fact assignable on the writ of error.

4. STATUTES—CONSTRUCTION—ADOPTION FROM SISTER STATE—COMMON LAW.

Where a statute adopted from another State requires aid from the common law, the judicial interpretation of the statute, given by the courts of that State, does not bind the courts of this State to the extent of determining the rule of common law applicable to the statute.

5. JUDGES—DISQUALIFICATION—RELATIONSHIP TO PARTY.

A judge is disqualified to hear and determine a case in which a blood relative of his wife within the ninth degree is a party, but he is not disqualified if the relationship arises merely from marriage of the party with the blood relative of his wife.

6. SAME—PARTIES—NOMINAL PARTIES—EXECUTORS AND LEGATEES.

Where a suit brought by a testator in his lifetime is continued in the name of his executrix, who is also his widow and a preferred and residuary legatee, she is not merely a nominal party, but is a party in interest, and a judge related to her by affinity within the prohibited degree is disqualified to act,

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though he was not so disqualified with reference to the testator.

7. SAME—STATUTES—CONSTRUCTION—SAGINAW COUNTY.

Sections 276–284, 1 Comp. Laws, providing, among other things, that in Saginaw county "all cases made, motions for new trials and bills of exceptions and settlement of cases for review * * * shall be heard, settled, and certified by the judge before whom the trial or hearing was had" do not require that the judge who entered a judgment must hear and determine a motion to vacate the same where, by reason of a change in parties, he has become disqualified since the entry of the judgment.

Error to Saginaw; Gage (William G.), J. Submitted June 7, 1907. (Docket No. 14.) Decided October 4, 1907.

Garnishment proceedings by Allaseba M. Bliss and Lorenzo T. Durand, executors of the last will and testament of Aaron T. Bliss, deceased, against the Caille Brothers Company, Wilber W. Steele, and A. Arthur Caille, copartners as the Caille Company, and Wilber W. Steele, A. Arthur Caille, and Adolph A. Caille, as garnishee defendants of Silas W. Tyler and Fred B. Tyler. There was judgment for plaintiffs, and defendants bring error. Reversed.

Appellants are defendants in garnishment proceedings which have proceeded to judgment against them upon their default for want of appearance and disclosure. Execution has issued and property has been seized thereunder. The garnishment proceedings are ancillary to an action of assumpsit begun by Aaron T. Bliss in the circuit court for the county of Saginaw, in which county he resided, against two joint promisors, some time copartners, by the issuing of a summons and writ of attachment (3 Comp. Laws, § 10584), by serving one defendant personally within the jurisdiction of the court and by attaching, as appears by the return of the sheriff, real estate of the other (nonresident) defendant, against whom,

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alone, the asserted ground for attachment existed, situated in said county. Judgment in the principal action was rendered for the resident defendant upon his plea of the statute of limitations and his discharge in bankruptcy, and against the other (nonresident) defendant, who did not appear. Appellants are charged as garnishees of the judgment debtor. They reside in the county of Wayne and the writ of garnishment was executed there.

In three several motions, in substantially the same form, entered in the court below, in each of which some of the garnishee defendants are the movers, it was asked that the judgment in the principal cause and in the garnishment proceeding, the defaults of the principal defendant and of the garnishee defendants, the service of the writs in both the principal and ancillary suits, be vacated and set aside, and that further proceedings under the execution levy be stayed pending the hearing. Reasons given for the relief sought are based upon the record and files in the several cases and upon affidavits, which it is claimed establish, among other facts, the one that the land upon which the writ of attachment was levied was not at that or at any other time the property of the nonresident judgment debtor. These motions coming on to be heard, they were denied. Thereupon appellants joined in suing out a writ of error and have separately assigned errors. No bill of exceptions was settled. In this court, a suggestion herewith set out was filed and brought to the notice of counsel for appellees:

"And now come the said Caille Brothers Company, a corporation, Wilber W. Steele, A. Arthur Caille, copartners, doing business as the Caille Company, Wilber W. Steele, A. Arthur Caille, and Adolph A. Caille, the garnishee defendants in the above-entitled cause, by Jonathan Palmer, Jr., their attorney, and respectfully show to the court that the Honorable William Glover Gage, one of the judges of the circuit court for the county of Saginaw, who heard and decided the several motions of said garnishee defendants to vacate the proceedings in said cause and who made the orders overruling said mo-

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tions and rendered the judgment against Fred B. Tyler, one of the principal defendants, and the judgment against the said garnishee defendants, was related within the ninth degree, to wit, second cousin to Aaron T. Bliss in his lifetime, and to his widow, Allaseba M. Bliss, one of the executors of the estate of the said Aaron T. Bliss, and one of the plaintiffs in the above-entitled cause and the principal legatee under the will of the said Aaron T. Bliss, and that said William Glover Gage was disqualified by reason of said relationship to sit as judge and hear and determine the matters involved in said case.

"This suggestion is based upon the affidavits of Silas W. Tyler, A. Arthur Caille, and Wilber W. Steele hereto attached."

The most that is claimed for the affidavits is that they show that Judge Gage and Aaron T. Bliss married second cousins; that such relationship as was thereby created existed when these suits were begun and when the judgments were rendered; that Allaseba M. Bliss is widow and legatee of Aaron T. Bliss, who died after the judgments were rendered and before the said motions were made, and the executrix of his last will and testament, who has by virtue of her office succeeded her husband upon the record as plaintiff in the actions. It does not appear that Mr. and Mrs. Bliss had children born of their marriage. The matter suggested was not brought to the attention of Judge Gage, and it is not claimed that he was cognizant of the exact relationship existing between his wife and Mrs. Bliss or that he was in fact, not indifferent. The suggestion as limited by the affidavits has not been controverted (3 Comp. Laws, § 10402), and the fact of the relationship, above stated, is not disputed. There is returned with the writ of error the record of the proceedings in said suits, the motions and the order made with reference to them, the affidavits used in support of the motions and in opposition thereto. It is assigned as error that the circuit judge entered the various judgments and heard and determined the motions to vacate the same when he was disqualified, by relationship with the plaintiffs, so to do. The only other assignment of error is

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based upon the refusal of the court to grant the motions. Appellees moved in this court to dismiss the writ of error and to strike from the files the said suggestion and affidavits. These motions are pending.

Jonathan Palmer, Jr. (*Elbridge F. Bacon* and *Russell B. Thayer*, of counsel), for appellants.

John A. McKay (*Gray & Gray* and *L. T. Durand*, of counsel), for appellees.

OSTRANDER, J. (*after stating the facts*). We regard the first assignment of error sufficient in form to raise the question of the disqualification of the judge and the consequent invalidity of the judgments. It is contended that we are not at liberty to consider this question. The motions which have been referred to were made November 28, December 8, and December 15, 1906, were heard December 29, 1906, and determined January 21, 1907, an opinion being filed. The writ of error was issued February 20, 1907, and was returnable March 29, 1907. The suggestion filed in this court is dated April 6, 1907, and the affidavits in support thereof were made March 26, 1907, and April 5, 1907, respectively. Two of the deponents, garnishee defendants, who join in an affidavit, say that about February 1, 1907, they first heard a rumor to the effect that Judge Gage was related by marriage to Aaron T. Bliss and Allaseba M. Bliss, and was disqualified, but were unable to obtain positive information until on or about March 26, 1907. One of the persons from whom they learned the fact of the said relationship was Silas W. Tyler, who made the other affidavit, was one of the defendants in the original suit, and is father of the judgment debtor, who avers that on March 26, 1907, he learned the fact from Mrs. Bliss. The fact upon which disqualification is predicated was not then discovered or suspected by appellants until after the entry of the orders denying their motions. The earliest opportunity, therefore, for presenting the point was after the last action

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taken by the judge and any motion or suggestion thereafter made in the court below could have resulted in nothing more than a confirmation of the alleged facts by admission on the part of the judge, or a denial of the facts or of the legal consequences asserted. Judgments and orders made by a disqualified judge are not voidable merely, but are void. They may be collaterally attacked and the objection, if not taken before decision is rendered, is available in the appellate court. See *Teller* v. *Wetherell*, 6 Mich. 46; *Peninsular R. Co.* v. *Howard*, 20 Mich. 18; *Horton* v. *Howard*, 79 Mich. 642; *Shannon* v. *Smith*, 31 Mich. 451; *Post* v. *Black*, 5 Denio (N. Y.), 66; *Dimes* v. *Grand Junction Canal*, 3 H. of L. Cas. 759; *Mercers, etc., Co. of Chester* v. *Bowker*, 1 Strange, 639; Cooley on Constitutional Limitations (7th Ed.), p. 595; 23 Cyc. p. 583; 11 Enc. Pl. & Pr. p. 781 et seq., and notes. We are of opinion that the point is before us for decision.

Was the judge disqualified by reason of his relationship to the plaintiff? A principal challenge to a juror, at the common law, was one where the cause assigned carried with it prima facie evidence either of malice or of favor to one of the parties. There were, also, challenges to the favor, which depended upon some asserted or disclosed circumstances of suspicion, the validity of which was determined by triers who found whether the juror was or was not indifferent. Among the principal challenges recognized was one predicated upon the relationship of the juror to a party. Blackstone says a juror was disqualified who was *of kin* to either party within the ninth degree. Chief Justice CHAMPLIN so stated the rule (obiter as to the degree), in *Horton* v. *Howard*, supra. Blackstone also treats consanguinity and kindred as terms to be defined alike. Book 2, chap. 14. Unlike the common law, our statute (3 Comp. Laws, § 10238) provides for peremptory challenges and it has been held that, therefore, the distinction between challenges for principal cause and to the favor is practically abolished. *Holt* v. *People*, 13

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Mich. 226. All challenges are for cause, and if the facts upon which the challenge is based are undisputed the decision of the question is one of law, and open to review on exceptions. *Holt* v. *People*, supra. We have no statute presumptions of disqualification of jurors on the ground of relationship, and are left to inquire whether among the rules of the common law in force in this State there are any for determining the question presented as one of law. The cases of *Hasceig* v. *Tripp*, 20 Mich. 216; *People* v. *Harding*, 53 Mich. 48; *Horton* v. *Howard*, supra, refer to the common law for rules of decision without, however, stating *a rule*. And in the first and last of these cases the relationship alleged was one of blood.

Our statute disqualifies a judge from sitting in a case in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties. 1 Comp. Laws, § 1109. Judge Gage was not related by consanguinity to Aaron T. Bliss and is not so related to Mrs. Bliss. It is unnecessary to do more than refer briefly to the origin and history of the legal doctrine of affinity. It grew out of canonical maxim that sexual union makes man and woman one flesh. The application of the maxim, especially as affecting marriage, divorce, and the legitimacy of children, gave rise to rules, the intricacy of which is proof of the amazing ingenuity of the churchmen. The rules varied with different periods. The temporal courts were sometimes recalcitrant in adopting those which were formulated, and it is not always easy to determine the degrees of relationship established by these rules within which, at a particular time, marriage was prohibited. But the notion obtained, to some extent, that relationship other than by blood might be so intimate that of itself it ought to prevent officers and jurors from acting in matters in which their relatives were interested. Courts were called upon frequently to determine whether the challenge of a juror or of an array of jurors was a principal challenge or one to the favor, and in so doing apparently in-

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troduced some confusion into the law as they recognized or failed to recognize some canonical rule of affinity. Since our statute, in terms, recognizes the doctrine and does no more, we must determine how much of it, applicable to a case like the one before us, survives, in doing which we are bound by the rule of no period and by the determination of no court. We are bound to consider and give effect to the changes in the common law made by our statutes in respect to the relations with which the doctrine was intimately associated. We should keep in mind, also, the fact that the use of the doctrine attempted is for the purpose only of determining whether in support of a high public policy affecting the administration of the law a juror or a judge should be regarded as indifferent or as biased.

An examination of authorities has led to the conclusion that the doctrine of affinity relationship should be limited by the following rule: Affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband. See Bouvier Law Dictionary, p. 112; 1 Am. & Eng. Enc. Law (2d Ed.), p. 911; 2 Cyc. p. 38; 23 Cyc. p. 583; 24 Cyc. p. 274; 1 Words and Phrases Judicially Defined, p. 245. It is true our statute was adopted from the State of New York, and that when adopted here it had received judicial interpretation by the courts of that State (*Foot* v. *Morgan*, 1 Hill [N. Y.], 654; *Paddock* v. *Wells*, 2 Barb. Ch. [N. Y.] 332), and that in the last-mentioned case, at least, a different rule was stated obiter. But the judicial interpretation which can be said to be binding upon the courts of this State extended only to the point of determining that the statute must be aided by the common law. The particular rule of common law adopted and in force in this State is not to be determined author-

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itatively by courts of another State. The rule above stated is the rule of decision in both of the New York cases above cited, as well as in *Higbe* v. *Leonard*, 1 Denio (N. Y.), 186, decided in 1845. The other and further rule stated, obiter, in *Paddock* v. *Wells*, to the effect that "relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife," is based upon very remote, and is opposed to the weight of modern, authority. We must decline to hold that the fact that two men, unrelated, marry wives who are second cousins, establishes between them a relation by affinity.[1]

We conclude, therefore, that Judge Gage is related by affinity to Mrs. Bliss; that he was not related by affinity to Aaron T. Bliss. He was not disqualified to hear and determine the causes or to enter the judgments sought to be vacated. It is conceded that he was disqualified to hear and determine the motions to vacate the judgments unless Mrs. Bliss is regarded as a nominal party, unless, also, an exception of necessity must be made because of the statute (1 Comp. Laws, §§ 276–284), which provides, among other things, that in Saginaw county—

"All cases made, motions for new trials and bills of exceptions and settlement of cases for review, * * * shall be heard, settled and certified by the judge before whom the trial or hearing was had."

Mrs. Bliss is not a nominal party. She is beneficially interested in the estate of her husband as a preferred and as a residuary legatee. 23 Cyc. pp. 584, 585. It is well established that the rule of disqualification of judges must yield to the demands of necessity, as, for example, in cases where applied it would destroy the only tribunal in

[1] "The groom and bride each comes within
The circle of the other's kin;
But kin and kin are still no more
Related than they were before."
—Bleckley, C. J. *Central Railroad & Banking Co.* v. *Roberts*, 91 Ga. 517.—REPORTER.

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which relief could be had. See the cases collected in 23 Cyc. p. 581, note 76. The statute recognizes the possibility of the absence, illness, "or inability from other cause" of the judges, preventing the one to whom business is assigned from acting. See sections 281, 283. It would not be claimed that the death of one of the judges would prevent the settlement of exceptions, etc., in cases which had been tried before him. This statute and the one disqualifying judges must be read together, and so read may both of them be given effect. It results that the first assignment of error must, to the extent indicated, be sustained. As the judgments are not attacked for anything appearing of record in the matters in which they were rendered, but only by matters brought upon the record with the motions to vacate, and as the only other error assigned is that the court, in consideration of such matters of fact, should have vacated the judgments, there is no further question for our consideration. An order will be entered setting aside the orders overruling the motions of appellants, and reinstating the same for argument, with costs.

GRANT, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred.

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GLEASON v. STONEHOUSE.

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DEEDS—DELIVERY—EVIDENCE—SUFFICIENCY.

On a bill to set aside a deed and for an accounting of the rents and profits of the property described therein, evidence examined, and *held*, that testimony tending to show that the grantor placed the deed, with others to other grantees, in a box in which he kept his papers, and before his death requested defendant to get the box and take care of it, did not tend to show a delivery of the deed to defendant.

Appeal from Kent; Wolcott, J. Submitted June 6, 1907. (Docket No. 45.) Decided October 4, 1907.

Bill by Clark H. Gleason, trustee, against Albert Stonehouse and Matie Stonehouse to set aside a deed, and for an accounting. From a decree for defendants, complainant appeals. Reversed, and decree entered for complainant.

Gleason & Lee, for complainant.

Smedley & Corwin, for defendants.

MONTGOMERY, J. The bill in this case was filed for two purposes: (1) To set aside a certain deed made by John Stonehouse and wife to defendant Albert Stonehouse of two lots in the city of Grand Rapids, Michigan, known as lots 107 and 110 of Leonard & Co.'s addition, on the ground the deed was never delivered, and to decree that complainant is the owner of the undivided one-third thereof. (2) To compel defendant to account to complainant for the undivided one-third of the rents and profits of said lots, also of the proceeds of certain lands in Montcalm county described in another deed from said John Stonehouse and wife to defendant, which lands defendant had sold and conveyed to innocent purchasers. By agreement

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of counsel the matter of the accounting was eliminated from this case, the same to be taken up, if it be determined that defandant should account therefor, in the accounting suits now pending in the circuit court for the county of Kent.

The two deeds referred to were executed by John Stonehouse and wife. The defendant Albert Stonehouse is the grantee named in each deed. Complainant contends that neither deed was ever delivered by the grantor to the defendant. The deed of lands in Montcalm county was executed April 3, 1883, and was recorded July 9, 1883. Consideration named in the deed is $3,500. The deed of the lands in the city of Grand Rapids was executed May 7, 1883, and was recorded June 1, 1883. Consideration named in the deed is one dollar. Both deeds were without present money consideration. John Stonehouse, the grantor, died in the city of Grand Rapids, May 28, 1883, intestate, leaving a large amount of property, both real and personal.

The question for determination in the case is one of fact, viz., Did John Stonehouse at any time during his lifetime deliver the two deeds in question to Albert Stonehouse, the defendant, with intent to have them take effect presently? A question was raised upon the trial as to whether, by a certain settlement between the parties, this matter had not been adjusted; but both parties now seem agreed that the settlement is not an issue in this case and cannot be determined. The circuit judge held that such settlement was not a bar to this case in any view, and the defendant has not appealed. The circuit judge, however, found as a fact that the deeds had been delivered. The testimony upon this subject of delivery is furnished by Sarah A. Bentley, a sister of John Stonehouse, and by the two defendants. For some time prior to the execution of these deeds John Stonehouse had been ill at Maple Hill, Michigan, where he had lived for some years, engaged in the lumber and shingle business. Mrs. Bentley was caring for him as a nurse. She testifies that the

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notary came to the house and prepared these deeds, together with deeds of other property to other of his children; that John Stonehouse signed them; that she, together with the notary, witnessed them; and that the papers were then handed to her with the request that she place them in a secretary kept in the house, and that she did so; that nobody was present except the notary and the witness.

The testimony shows that not long after this John Stonehouse was removed to Grand Rapids, and, as before stated, died on the 28th day of May, 1883, which was about three weeks after the last deed was executed. Mrs. Bentley testifies that after the death of John Stonehouse, the defendant Albert Stonehouse asked her where those deeds were put, and she told him they were put in his father's secretary. This conversation, she states, was after the death of John Stonehouse and before the funeral. The defendant testifies that he has no recollection whatever of any such conversation and testifies that when his father came down from Maple Hill to Grand Rapids he accompanied him and that his father requested him to bring down a box. We quote from his testimony:

"He says, 'Albert, you know the box that I always keep my papers in?' I said, 'Yes, sir.' And he says, 'You go and get that box and bring it with you because that contains all of my papers.' * * * I took this box with me. Father mentioned it again that day. He told me after we got him into the house and all settled so that he was a little easier, he says, 'Albert, you take that box and take care of it.' I took it home. It contained five deeds, also abstracts, quite a few receipts and all those line of papers, old deeds and old abstracts of property. I have the box yet."

Witness also denied having gone to Maple Hill after the deeds. He testifies that after the funeral the deeds were in the box and he took out the deeds of his property up there and brought them down and put them on record, and gave his brother his two deeds.

The defendant Matie Stonehouse testified that she was

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present when his father reached Grand Rapids from Maple Hill, and testifies that when Albert told his father that he was going home for the night his father asked, "Have you got the box that you brought down with you?" Albert said, "Yes." The father said, "Well, take it with you, it is yours, the papers that are in there are yours," and she recognized the box which contained the deeds as the one Albert took home. This witness is somewhat confused in stating this conversation on cross-examination, and it is to be noted that her testimony differs very materially from that of her husband.

The testimony of Albert Stonehouse, so far from showing delivery, tends in the opposite direction. The box in question not only contained the deeds running to Albert but to others as well, together with other important papers. John Stonehouse, being too ill to care for it himself, requested Albert to take the box and take care of it. This goes far to disprove any purpose of delivering, to have present effect, any one of the papers contained in the box. There is no pretense that any authority was delegated to Albert to deliver the deeds to either of the other children, and it is not to be inferred that John Stonehouse expected to deliver the deeds to one of the children and leave the others not delivered.

In view of this conflict between the testimony of the defendants, it is too much to ask that we place credence in the statement of the witness Matie Stonehouse of the precise words that John Stonehouse used on the occasion in question. In the first place the words prove too much. John Stonehouse could not have intelligently said of the papers in the box that they belonged to Albert Stonehouse. This might possibly have been said of the two deeds in question if the grantor had so intended; but the box contained many other papers—among the others, deeds to other children. These certainly were not the papers of Albert Stonehouse. Furthermore, it was not Albert Stonehouse's box, as he well understood.

We think the fair course is to accept the testimony of

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Albert Stonehouse as more reliable than that of his wife, and his testimony fails to show a present delivery of these deeds in its most favorable construction to the defendant. We feel constrained to reverse the decree of the circuit court, and direct that the deeds in question be held inoperative, and that the complainant, subject to any defense that may be made in the accounting case, is entitled to the rents and profits of her one-third interest in this property.

Complainant will recover costs of both courts.

CARPENTER, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

FRIEDMAN v. ADAMS.

COMPROMISE AND SETTLEMENT—EFFECT.

Defendant by written order authorized plaintiff to retain from moneys due him a certain amount as a contribution towards the payment by plaintiff of a certain claim against a railroad upon which both parties had liens. Subsequently plaintiff entered into an agreement with others in interest providing that plaintiff should be fully protected against the claim, and that defendant should be paid in full, and later, before any part of the claim had been paid, consented to the payment to defendant of the sum due him and the taking of his receipt in full. *Held*, that plaintiff had no cause of action against defendant on the written order, whatever claim he may have had originally being lost by the settlement and receipt.

Error to Wayne; Donovan, J. Submitted June 7, 1907. (Docket No. 23.) Decided October 4, 1907.

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Assumpsit by William Friedman against John T. Adams for an amount due upon a written order. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Bernard B. Selling, for appellant.

Wilkinson, Post & Oxtoby, for appellee.

BLAIR, J. Plaintiff, as assignee of William B. Strang, Jr., brought suit against defendant for a sum alleged to be due upon a written order. The declaration contained a special count, to which were added the common counts. The special count set forth the cause of action, as follows:

"For that, whereas, the said defendant and the said William B. Strang, Jr., hereinafter called plaintiff's assignor, were, in the year of 1899, jointly engaged in the building of the Detroit & Lima Northern Railroad, and in the course of said enterprise it became necessary for the plaintiff's said assignor and said defendant to pay various indebtedness which the plaintiff's said assignor and the said defendant assumed and were jointly liable for, among which was an indebtedness of $12,500 which the plaintiff's said assignor paid at the request of said defendant, said defendant agreeing to pay his share of said money and giving to said plaintiff's assignor an instrument in writing reading as follows:

"'TOLEDO, OHIO, Oct. 5, '99.

"'W. B. STRANG, Jr.:

"'Whereas you are giving the Minnesota Loan & Trust Company and Chas. N. Nelson (or E. A. Merrill for them) an order on the Columbus Northwestern Ry. Reorganization Committee for $12,500 in settlement of the Haskell claim, to be paid out of the moneys due you, this authorizes you to charge and retain from amounts due me as a contribution to said $12,500 the sum of $2,500.'

"'J. T. ADAMS.'

"Said plaintiff's assignor paid said $2,500, relying upon the promises of the said defendant to make good or to pay to said plaintiff's assignor the said sum of $2,500 mentioned in the foregoing instrument.

"It then became and was the duty of the said defendant

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to repay to the said plaintiff's assignor the said sum of $2,500, with interest, but the said $2,500, with interest, has never been paid or made good to the plaintiff or his said assignor."

The Merrill claim referred to in the order was based upon a written instrument signed by C. N. Haskell containing, among other things, the following:

"NEW YORK, N. Y., November 21, 1898.

"On the 21st day of May, 1899, for value received, I promise to pay to the order of Charles N. Nelson and the Minnesota Loan & Trust Company of Minneapolis, at the office of the Minnesota Loan & Trust Company in Minneapolis, in the State of Minnesota, the sum of twenty-five thousand dollars ($25,000) with interest from the date thereof at five per cent. (5%) per annum, having deposited as security therefor the certificate of William B. Strang, Jr., as contractor, for the sum of forty-five thousand dollars ($45,000) purporting to be secured as a first lien upon the Detroit & Columbus extension of the Detroit & Lima Northern Railway Company, which certificate bears date the 16th day of August, 1898."

Prior to September 6, 1898, Strang had been engaged, as manager of a finance company, in constructing the Detroit & Lima Northern Railroad and a branch or extension from Peoria to St. Mary's, Ohio. Strang's compensation was the cost of construction and 10 per cent. additional.

In the course of construction, Strang issued lien certificates to persons furnishing money to build the road, payable when he collected from the company. September 6, 1898, the road went into the hands of a receiver, and thereupon Strang filed a lien against the road for about $700,000, covering all of the Strang lien certificates, the money which he had put into the road individually, and all other claims which he had against the road. Soon after the appointment of the receiver, plans were instituted for reorganization, and two separate committees were appointed for that purpose, one for the Detroit & Lima Northern, the other for the St. Mary's Branch, referred to as the Columbus Northwestern Railway.

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Charles N. Haskell was the promoter of the Detroit & Lima Northern Railroad, and was president of the same. John T. Adams, the defendant in this suit, was a subcontractor and sublienor under William B. Strang, plaintiff's assignor. Charles N. Haskell was the owner of one lien certificate to the amount of $10,000, which had been assigned to him. All of the liens not represented by Mr. Strang were to be transferred to the main line, which would leave the St. Mary's division free from all liens except those represented by Strang. In order to sell the St. Mary's division free and clear from the rest of the road except the Strang liens, it was necessary to cancel certain bonds and certain lien certificates or put them into the hands of somebody who had authority to do so.

On September 7, 1899, William B. Strang placed in the hands of the Columbus Northwestern Reorganization Committee his lien, upon certain stipulations and conditions, the principal ones being the recognition of certain claims of Strang as entitled to priority, and payable in full. Priority was granted to these claims of Mr. Strang by various resolutions of the reorganization committee.

The holders of the Merrill claim refused to agree to the plans of reorganization unless Strang would guarantee them that they would be paid out of the first money coming to him. Strang declined to do this unless Adams and Mr. Harmon would give him orders like the one declared upon. Haskell procured such orders, the one from Harmon being for $4,500, and thereupon Strang filed with the committee an order to pay to the holders of the claim "out of such moneys to which I may be entitled by the terms of the reorganization agreement and the plan accompanying the same, bearing date September 7th, 1899," $12,500, with interest at 5 per cent. The order, which was dated October 20, 1899, and was accepted by the committee October 21, 1899, provided that—

"At the time of paying the said sum of $12,500, and interest, in compliance with the provisions hereof, you are to receive from the said Minnesota Loan & Trust Com-

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pany, and said Nelson, or their assigns, certificate of deposit, which shall be issued by the Hamilton Trust Company to them upon the deposit of my certificate of $45,000 and a certain note of Charles N. Haskell to them, bearing date November 21st, 1898, to secure the payment of $25,000 and interest, at the rate of five per cent. per annum.

"The said trust company and said Nelson shall be under no obligation to deliver the said securities, unless the aforesaid payment is made to them within one year from the date hereof.

"Dated New York, October 20th, 1899."

On September 11, 1900, the Columbus Northwestern Railway having been advertised to be sold at public sale on September 21, 1900, Strang made a proposition to the reorganization committee containing, among other things, the following:

"As no proposition has been suggested in reference to the purchase of the Columbus Northwestern Railway, the sale of which is set for September 21st, 1900, which will protect the creditors of the committee under private agreement, I herewith submit for your acceptance a proposition under which I may meet the obligations of the committee and at the same time save myself and creditors as well as the certificate holders from further great loss. I, or such person or corporation as I may designate, will bid in the railway property at the coming sale. Regardless of the price I may have to bid at said sale to purchase the property, I will settle the following claims, etc., for the committee and this shall be accepted by them in payment for said property, to wit: * * *

"It is distinctly understood that my bid at the public sale for the purchase of this property shall in no way affect the payments that I have to make for or to the committee, my object being to free and discharge the committee from liability if I undertake to become the purchaser or provide for a purchaser of the property and I am to have full power to use for this purpose all claims and securities deposited with the committee or under their control and with further power to compromise, contest, repudiate or adjust any apparent charge or liability against the committee or property. The committee will by proper orders or assignments invest me with the legal

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control of all of said claims and securities for the above purchase.

"Having acquired title to the property, I will place same in the hands of a railway corporation and they shall upon account of said property issue the following stocks and bonds. * * *

"The contract between the committee and the depositors with the Hamilton Trust Company contemplated the reorganization of the Columbus & Northwestern Railroad Company under plan 'A' or plan 'B,' set forth as a part of said contract. My proposition cannot be carried out under plan 'A' but is a substantial execution of plan 'B,' except that the certificate holders and other interests under the Strang lien and judgment, after the payment of the cash requirements, will receive 63% in preferred stock of the face value thereof, instead of 100% of perferred and common stock of the principal and interest thereof, as set forth in plan 'B.' This being a departure from the contract of the committee with its depositors, and the assent of 66% in writing of the certificate holders and beneficiary interests, other than cash, being required, I request that the committee shall forthwith obtain the necessary consents in writing so that there may be no delay.

"This proposition and the benefits to be derived therefrom shall extend only to those certificate holders who shall assent in writing on or before the 21st day of September, 1900.

(Sgd.) "W. B. STRANG, Jr.
"O. K., C. N. HASKELL."

This proposition was accepted by the reorganization committee. The property was bid in by Strang at the sale under an agreement with Haskell that the property was to be bid in for the joint interest of Strang and Haskell and defining their interests in the property. The agreement contained a provision that:

"It is also understood as a part of this agreement that the payment to the Minnesota Loan & Trust Company of $12,500 is to be assumed and paid by said Haskell."

At the time of bidding in the property, Strang had an understanding with the Toledo & Ohio Central Railway Company that the property should be sold to it.

On November 1, 1900, Strang made a written proposition

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to the Toledo & Ohio Central Railway Company to sell the property to it, which proposition was accepted by the company on the same day. On December 21, 1909, Strang and Haskell entered into a new agreement in writing, reciting the joint interest of the parties, the agreement to sell to the Toledo & Ohio Central Railway Company, and containing provisions as to the interests of the parties, which were more unfavorable to Strang than those in the September agreement. Strang fully understood this agreement and its effect, but testified that Haskell and Mr. Lewis, who was attorney for the Toledo & Ohio Central Railway Company and Haskell as well as for Strang, took advantage of his financial straits and practically compelled him to sign this agreement or lose everything. This agreement, after providing that a portion of the proceeds of the sale to the railway company should be allowed and delivered to Strang, required that the remainder should constitute a fund for the payment of the obligations assumed, and, among others:

"And out of said funds is also to be paid such an amount as may be due to said John T. Adams, if anything, out of the item of $28,961.10 referred to herein as a right of way claim.

"7. It is further understood, as to the claim of E. A. Merrill for twelve thousand five hundred dollars ($12,500), which has been guaranteed by said Strang, that said Strang is to be fully protected on account thereof out of the above-mentioned remaining securities.

"8. All of the bonds, securities, subsidies and other property remaining after compliance with the terms and conditions herein set forth, is to become and be the sole property of said Haskell and those he represents, not mentioned herein.

"10. It is further mutually agreed and understood that all claims to be paid out of said remaining fund shall be in the hands of said Haskell for compromise, settlement or litigation, as he may deem proper, but all settlements are to be to the approval of said Strang, and that said Strang will co-operate therein to the best of his ability in aiding such compromise, settlement or litigation."

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The remaining securities referred to in the agreement were left by the parties in the hands of their attorney, Mr. Lewis, to pay the various claims as adjusted. On January 12, 1901, Mr. Lewis paid to the defendant Adams the sum of $6,000 and took from him the following receipt:

"I acknowledge receipt from Doyle & Lewis of the sum of six thousand dollars ($6,000), the same being in full payment, satisfaction and discharge of any and all claims heretofore held by me or by the firm of Vallery & Adams against the Detroit & Lima Northern Railway Company, or the Columbus Northwestern Railway Company, or either of them, and especially covering any interest which I may have had in the so-called Adams right of way claim referred to in the decree of December 16, 1899.

"This receipt, however, is not intended to do other than release the railroads and property from any claim or lien, but does not release or satisfy a recent contract had with C. N. Haskell by which I am to receive further securities from him as a part of the terms of said last-mentioned contract.

Signed "J. T. ADAMS.

"Toledo, Ohio, Jan. 12, 1901."

On January 24, 1901, Haskell and Strang executed the following writing:

"TOLEDO, OHIO, Jany. 24, 1901.

"To DOYLE & LEWIS:

"We hereby consent to the following payments made and to be made out of the fund now in your hands and collected in the Harmon case, and known as the Adams right of way claim, amounting to $30,829.09, as follows:

"J. T. Adams	$6,000.00
F. S. Mitchell	1,401.00
W. B. Strang, Jr.	1,200.00
Dime Savings and Banking Co.	10,550.00
Euclid Ave. Trust & Savings Co.	8,900.00

Signed "W. B. STRANG, Jr.

"C. N. HASKELL."

On the 19th day of September, 1902, Mr. Lewis paid the Merrill claim.

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The circuit judge directed a verdict for defendant, and plaintiff has brought the record to this court for review. In our opinion, the trial judge did not err in holding, as a matter of law, that plaintiff had not established his cause of action.

The instrument declared upon was not an evidence of a general indebtedness on the part of Adams to Strang, but was an agreement to contribute to the payment of the Merrill claim from a special fund, in consideration of the payment of the claim by Strang out of moneys due him. No money was to be paid by Adams, nor was any action required of him. If the reorganization committee used moneys due to Strang to pay the Merrill claim, Strang was authorized to receive and retain of the moneys due to Adams the sum of $2,500. The reorganization committee did not succeed in carrying out its plan, and Strang took the matter off its hands and assumed its obligations. In the September contract with Haskell, Strang expressly renounced an intention to pay the Merrill claim, and provided for its payment by Haskell. In the December contract, Strang provided that he should be fully protected on account of the Merrill claim, and that Adams should be paid what was due him, if anything. On January 12, 1901, they settled with Adams and took his receipt in full. At the time of the settlement with Adams, no part of the Merrill claim had been paid, and plaintiff, by his own act, put it out of his power to retain any sum due Adams upon a subsequent payment by him of the Merrill claim. Whatever claim plaintiff may have had against defendant Adams prior to the time of the settlement, he lost thereby.

Judgment affirmed.

GRANT, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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COLEMAN *v.* McGOWAN'S ESTATE.

1. EVIDENCE—DECLARATIONS—ADMISSIBILITY.
   Declarations of a decedent tending to disprove a claim against his estate, not made in presence of the claimant, cannot be shown on the trial of the claim.

2. SAME—DECLARATIONS BY DECEDENT—EFFECT.
   Where a claimant against the estate of a decedent for services shows declarations of decedent that there was an understanding that claimant should be paid, a contention that no recovery can be had for services rendered prior to the earliest of the declarations is not tenable, since the declarations constitute an admission of the existence of an obligation to pay claimant's entire claim.

Error to Genesee; Wisner, J. Submitted June 7, 1907. (Docket No. 98.) Decided October 4, 1907.

Julia Coleman presented a claim against the estate of Elizabeth McGowan, deceased, for services rendered. The claim was allowed by the commissioners, and contestant appealed to the circuit court. There was judgment for claimant, and contestant brings error. Affirmed.

Seth B. Terry (*Everett L. Bray*, of counsel), for appellant.

Black & Roberts, for appellee.

CARPENTER, J. Elizabeth McGowan died May 14, 1904. From 1889 until her death, with the exception of about a year, Miss McGowan lived at the home of Mrs. Coleman, the above-named claimant. Claimant brings this suit to recover compensation for boarding and caring for the deceased during this time. In the circuit court she recovered a verdict and judgment for $2,073.50. The estate asks us to reverse that judgment upon several grounds:

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First. It is contended that the trial court erred in refusing to permit the estate to introduce in evidence declarations of deceased not made in claimant's presence, which tended to disprove the claim. The ruling of the trial court was correct. *Van Fleet* v. *Van Fleet*, 50 Mich. 1.

Second. It appeared from the testimony that deceased had stated that she had never paid claimant for any of the board or care furnished; that this was to be fully paid out of her estate after her death; that there was an understanding to this effect between her and claimant and that for this reason claimant would have no trouble in collecting her account. The point is made that inasmuch as it appeared by this testimony that the earliest of these declarations was made in 1895 there could be recovery for nothing prior to 1895. I think it a proper answer to this contention to say that from this testimony the jury were warranted in inferring that the understanding admitted by the deceased was made at such a time and in such a manner as to obligate her estate to pay claimant's entire claim. The declarations above set forth, properly construed, constitute an admission of the existence of such an obligation.

Third. In answer to other complaints of the estate, we say: (*a*) That in charging the jury the trial judge presented in a clear and fair manner every proposition of law needful for them to consider; (*b*) that the verdict of the jury was not against the weight of the testimony.

Judgment affirmed.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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DANIEL *v.* CITIZENS' MUTUAL FIRE-INSURANCE CO. OF JACKSON.

1. JUDGMENT—CONCLUSIVENESS—MANDAMUS—BILL OF REVIEW.
   The denial on the ground of laches of a mandamus to set aside an order transferring receivership proceedings to another county, on the ground of irregularities, is conclusive of the petitioner's right to question the same irregularities by filing a bill of review.

2. EQUITY—LACHES—RECEIVERSHIP PROCEEDINGS.
   Laches which prevents complainant from assailing an order transferring a receivership of a mutual fire-insurance company to another county will also prevent his assailing orders accepting the resignation of the receiver, appointing a new receiver, and approving an assessment upon the policy holders, where, upon the assumption of the regularity of the orders, important proceedings have been taken which cannot otherwise be sustained.

3. RECEIVERS—RESIGNATION—APPOINTMENT OF SUCCESSOR — COLLUSIVE AGREEMENT.
   That the attorney of the creditors of a mutual-insurance company in the hands of a receiver procured the resignation of the receiver, procured the consent of another person to act as receiver, induced the commissioner of insurance to petition for his appointment, and since his appointment has acted as the attorney for the new receiver, and as such procured the transfer of the proceedings to the county in which the receiver and attorney reside, the judge of the county in which the proceedings were instituted being disqualified, does not justify the vacation of the orders by which the results recited were accomplished, there being no understanding that the new receiver should favor the creditors or be otherwise unfaithful to his duties.

4. VENUE—CHANGE—PROPRIETY OF ORDER.
   Where a transfer of receivership proceedings to another circuit was necessary because of the disqualification of the judge of the circuit in which they were begun, the fact that the judge called to preside transferred them to his own circuit does not show any impropriety, where the selection was not improper or prejudicial to any party, it is not claimed that the judge

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was a party to any collusive arrangement, and no improper means were used to induce the selection.

5. RECEIVERS—ATTORNEYS—EMPLOYMENT—PROPRIETY.
There is no impropriety in the employment by a receiver of the same attorney employed by the creditors unless there is a conflict of interests, in which case the remedy is by employment by the receiver of another attorney.

6. SAME—ASSESSMENT—EXCESSIVENESS—REMEDY.
Excessiveness of an assessment by a receiver is no ground for a bill of review, the remedy by vacating it, or by securing a proper distribution of the fund raised, being adequate.

Appeal from Ionia; Davis, J. Submitted June 10, 1907. (Docket No. 54.) Decided October 4, 1907.

Petition by Thomas I. Daniel against the Citizens' Mutual Fire-Insurance Company of Jackson and James V. Barry, commissioner of insurance, to file a bill of review. From a decree denying the petition, petitioner appeals. Affirmed.

Thomas E. Barkworth and *Grove H. Wolcott*, for petitioner.

George E. Nichols, for defendants.

CARPENTER, J. This is another chapter in the litigation reviewed by us in *Nichol* v. *Murphy*, 145 Mich. 424. The statement in that opinion will supplement the statement in this. In 1899 proceedings were instituted in the circuit court for the county of Jackson, in chancery, to wind up the affairs of the Citizens' Mutual Fire-Insurance Company, one of the above-named respondents. In these proceedings Forrest C. Badgley was appointed receiver, and upon his petition a pro rata assessment was made against those having policies in said company—of whom petitioner was one—for a sufficient amount to pay the indebtedness of the company and the expenses of the receivership. February 17, 1906, Badgley resigned as receiver. His resignation was accepted and John Nichol of Ionia

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was appointed his successor. On the same day an order was made transferring said cause to the circuit court for the county of Ionia, in chancery. March 22, 1906, said circuit court for said county of Ionia, in chancery, on the petition of said Nichol, as receiver, set aside the assessment formerly made during Badgley's receivership, and made a new assessment. The amount which petitioner was required to pay by this second assessment was smaller than that in the first. May 25, 1906, a suit at law was commenced by said receiver against said petitioner to recover for said assessment. November 10, 1906, plaintiff applied to this court for a mandamus to compel the vacation of the order transferring said cause from the Jackson circuit to the Ionia circuit. This application was denied on the ground of laches. In January, 1907, plaintiff asked leave to file a bill of review, by which he might obtain a vacation of the order accepting the resignation of Badgley as receiver, the order appointing Nichol as his successor, the order transferring the cause and the order approving the second assessment. Leave to file said bill was denied and petitioner appeals to this court.

Petitioner assails the above-mentioned orders upon two grounds. *First*, because of certain irregularities disclosed by the record. *Second*, because of an alleged collusive arrangement between Badgley, the retiring receiver, Nichol, his successor, and the creditors of the insolvent corporation.

The irregularities disclosed by the record were brought to our attention last November in plaintiff's application for a mandamus to compel the vacation of the order transferring said cause from Jackson county to Ionia county. The order of transfer was made in February and the application for mandamus was not made until November, and in the ensuing interval important orders had been made and important action taken upon the assumption that the circuit court for the county of Ionia, in chancery, had jurisdiction. In our opinion the circumstances—and among these circumstances may be mentioned petitioner's

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early knowledge of the proceedings which he claims were irregular—required a diligence which petitioner had not exercised, and we decided that he was guilty of laches which disentitled him to relief. That determination is decisive against petitioner's right to raise these irregularities by filing a bill of review. If he was guilty of laches in November he certainly was guilty of laches in the following January, and the laches which prevented his assailing the order of transfer prevents his assailing the other orders, for upon the assumption of their regularity important proceedings have been taken which cannot otherwise be sustained.

The circumstances respecting the alleged collusive agreement are these: The attorney representing all the creditors procured Badgley's resignation, though Badgley had already determined to resign and it was eminently proper that he should; he procured the consent of Nichol to act as receiver; he induced the commissioner of insurance to file a petition asking the appointment of Nichol as receiver; he has acted as Nichol's attorney since the latter's appointment as receiver, and in that capacity he procured the order transferring said cause. There was, however, no understanding that Nichol, as receiver, should do anything to favor the creditors, or that he should be in any way faithless to his receivership duties; and we are satisfied that he has been faithful to those duties. Nor was there any impropriety in the order transferring the cause. The cause should have been transferred from the Jackson circuit for the judge of that circuit was disqualified. The selection of the circuit to which it should be transferred was made and had to be made by the judge—in that instance the judge of the Ionia circuit sitting in the Jackson circuit—who ordered the transfer. That judge was not a party—indeed this is not claimed—to any collusive arrangement, and no improper means were used to induce him to make said selection. The selection itself was not an improper one nor prejudicial to the interests of any of the parties concerned in the litigation. The arrangement

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thus disclosed does not justify the vacation of the orders in question. The only possible impropriety arises from the circumstance that the attorney employed by the receiver is also the attorney of the creditors. This would be improper only in the event of a conflict between his duty to the creditors and his duty to the receiver, and if that contingency does arise it needs no other remedy than this, viz., the receiver should at once engage another attorney.

Complaint is also made that the second assessment is excessive. If this complaint is meritorious, and we are by no means convinced that it is, adequate relief can be had by vacating it or by securing a proper distribution of the funds raised by assessment. It does not justify the filing of a bill of review.

The order appealed from should be affirmed.

McALVAY, C. J., and GRANT, HOOKER, and MOORE, JJ., concurred.

CULVER *v.* FIDELITY & DEPOSIT CO. OF MARYLAND.

1. APPEAL AND ERROR—APPEAL BOND—REVERSAL—REHEARING—LIABILITY OF SURETY.

   A bond to stay execution on a judgment pending a writ of error, the condition of which obligates the surety "to pay the said judgment and costs if the same is not reversed" and to "prosecute its writ of error to effect and pay and satisfy such judgment as shall be rendered against it thereon," obligates the surety to satisfy the final judgment rendered on the writ of error, and the obligation is not discharged by a reversal of the judgment which is followed by a rehearing and an affirmance, only the opinion on rehearing being the final judgment.

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2. SAME—DECISION—REHEARING—NOTICE—NECESSITY.
Service of notice of an application therefor is not essential to give the court jurisdiction to grant a rehearing, since the court could grant a rehearing upon its own motion without application.

3. SAME—APPEAL BOND—JUDGMENT—HARMLESS ERROR.
A judgment against a surety on an appeal bond will not be reversed for failure to prove service of an application for a rehearing in the original case, where the records of this court show that such service was had.

4. EVIDENCE—JUDICIAL NOTICE—COURT RECORDS.
This court will take judicial notice of its own records in another case.

Error to Van Buren; Des Voignes, J. Submitted June 11, 1907. (Docket No. 66.) Decided October 4, 1907.

Debt by William Culver against the Fidelity & Deposit Company of Maryland for the amount of an appeal bond. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

Edward Maher and *C. B. Hirtzel*, for appellant.

Thomas J. Cavanaugh and *L. A. Tabor*, for appellee.

CARPENTER, J. Plaintiff obtained a judgment against the South Haven & Eastern Railroad Co. in the circuit court for the county of Van Buren. For the purpose of staying the issuance of execution on said judgment said South Haven & Eastern Railroad Co. filed a bond upon which the present defendant was surety. The condition in said bond is as follows:

"Now, therefore, the condition of this obligation is such that if the said South Haven & Eastern Railroad Company shall pay the said judgment and costs if the same is not reversed, and if a writ of error is issued in said case that the said South Haven & Eastern Railroad Company will prosecute its writ of error to effect and will

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pay and satisfy such judgment as shall be rendered against it thereon, then this obligation to be void, otherwise to remain in full force and effect."

The cause mentioned in said bond was argued in this court February 13, 1906. May 24, 1906, the judgment of the lower court was reversed. Subsequently a rehearing was ordered and had and the judgment affirmed. *Culver* v. *Railroad Co.*, 144 Mich. 254, 257. As this was not paid, plaintiff brought this suit on the bond and recovered a verdict and judgment in the lower court. The surety, the defendant in this case, asks a reversal of that judgment.

Its principal contention is that "when the judgment was reversed on May 24th, 1906, the obligation of the bond was terminated."

This contention must be overruled. It proceeds upon an improper construction of the bond and of the judgment of this court. The language above quoted from the bond obligating defendant to "pay the said judgment and costs if the same is not reversed," and to "prosecute its writ of error to effect and pay and satisfy such judgment as shall be rendered against it thereon," obligates it to satisfy the final judgment rendered on said writ of error. *Pearl* v. *Wellman*, 11 Ill. 352; *Crane* v. *Weymouth*, 54 Cal. 476; *Humerton* v. *Hay*, 65 N. Y. 380; *Robinson* v. *Plimpton*, 25 N. Y. 484. The judgment of May 24th was in no sense a final judgment. The judgment of affirmance subsequently rendered was the final judgment. It follows that the obligation of the bond was not terminated by the reversal of May 24, 1906. See *Pearl* v. *Wellman*, supra.

Defendant also contends that the judgment should be reversed because the record fails to show service of notice of the application for a rehearing, as required by the rules of this court; that without such notice "the rehearing is inoperative in law, because depriving the Fidelity Company of 'due process of law' and the protection accorded by the Federal Constitution to a foreign corpora-

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tion." We answer this contention by saying that service of notice of the application was not essential to give this court jurisdiction to grant a rehearing. It could grant that of its own motion without any application whatever. We think, however, that in this case it is proper to say that if defendant is right in its present contention the error in question is altogether harmless. The records in this court in the case of *Culver* v. *Railroad Co.*, of which we may take judicial notice, supply the alleged defect in the present record. Those records show that on June 1, 1906, and within seven days after the reversal heretofore alluded to, plaintiff filed an application for a rehearing. It must be presumed that this application was properly served, for four days afterwards, on the 4th of June, defendant filed an answer to said application. Defendant has no right to have a judgment reversed for an error which is corrected by the records of this court.

Judgment affirmed.

MCALVAY, C. J., and GRANT, HOOKER, and MOORE, JJ., concurred.

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CAMERON *v.* SHUMWAY.

1. VENDOR AND PURCHASER—OPTION—CONSTRUCTION.
   A writing executed by a landowner giving an option to purchase land on or before a certain date, and stating that when the balance of the purchase price "is paid a warranty deed of said property is to be given and an abstract to date of transfer furnished showing perfect title, also a tax history is to be furnished," only entitles the purchaser to a deed, abstract, and tax history on payment of the price within the time limited; and where the holder of the option neither accepts it in writing or tenders the price within the time limited his right is lost, although he demands the deed, etc., and states that payment will be made when satisfactory title is furnished.

2. SAME—OPTION—WHAT CONSTITUTES.
   An option is a contract by which the owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a limited time, and the other party acquires neither an interest in the land, nor a chose in action, prior to his election to purchase within the time limited.

Appeal from Ingham; Wisner, J., presiding. Submitted June 14, 1907. (Docket No. 38.) Decided October 4, 1907.

Bill by Lowry Cameron against Frank W. Shumway for the specific performance of an agreement for the sale of certain land. From a decree dismissing the bill, complainant appeals. Affirmed.

L. B. Gardner, for complainant.

Rollin H. Person, for defendant.

MOORE, J. This is a bill of complaint filed for the purpose of obtaining specific performance of an agreement in relation to the sale of lands. The material prayer of the bill is as follows:

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"That said defendant may be decreed to make a good and sufficient deed of conveyance to your orator for the said described premises, your orator being ready and willing, and hereby expressly offering to perform the said agreement on his part, and to pay defendant the residue of the said purchase money upon the defendant's making out a good and sufficient title to the said premises and executing a proper conveyance thereof to your orator, and furnish an abstract and tax history and otherwise perform his part of said agreement pursuant to the terms of the said agreement."

In disposing of the case the trial judge filed a written opinion which states the questions involved. It is as follows:

"May 4, 1904, Mr. Frank W. Shumway was the owner of certain lots in the city of Lansing described in the pleadings in this case, and there was in the city of Lansing at that time a man by the name of Frank H. Hendrick who was engaged in the real estate business, a real estate broker. These two parties met at the Boat Club parlors, so-called, in the city of Lansing, on the 10th day of May, 1904, and had some conversation in respect to a sale of these lots that I have mentioned, and it resulted in the drawing by Mr. Hendrick of a certain option and the signing of the same by Mr. Shumway. It is testified by Mr. Shumway that at the time of this conversation he called Mr. Hendrick's attention to the fact that there were on these lands certain taxes levied for the construction of a sewer; that he had been advised were void and that any contract he might make in respect to a sale of those lots should be subject to his rights in substance to contest those taxes; that he did not propose to pay them; that they were unjust and illegal.

"Now that conversation, that part of it that I now call your attention to is denied by Mr. Hendrick, and he says that the entire agreement was embodied in this so-called option, which is as follows:

"'For and in consideration of $1.00 to me in hand paid, the receipt whereof is hereby acknowledged, I hereby give to Frank H. Hendrick, of Lansing, Mich., an option to July 1, 1904, to purchase of me for the sum of $2,500 the following described property (describing the property); also agree to furnish abstract of said property showing perfect title.

"'Dated, Lansing, Mich., May 10, 1904.'

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"On the 15th day of the same month, Dr. Shumway was taken ill with pneumonia, * * * that his life was despaired of. That during that illness and before the expiration of the time of that option Mr. Hendrick called at the house of Mr. Shumway, which was at Williamston, and endeavored to see the doctor in respect to procuring an extension of the option, but the doctor was so ill that the nurse in attendance and the wife of the doctor would not permit him to be seen, but finally on the 28th day of June he had so far recovered as to be able to sit up, although not yet able to be dressed and sit up for any considerable length of time, and on that day Mr. Hendrick again called at the house at Williamston to see Dr. Shumway. The doctor testified that he was nervous, weak, during the course of the conversation, it was necessary that he should be attended medically and given an injection of some kind, and that Mr. Hendrick wanted to have the option extended until the 15th of November. He would not consent to that, he would not extend it longer than September 1st. Finally the date, November 15th, was changed in the instrument which was always prepared and brought there by Mr. Hendrick, changed to September 1st and finally the doctor signed it with the assurance on the part of Mr. Hendrick that nothing contained in it would in any way interfere with his right to contest those taxes; and also that it was merely a continuation of the original option. He testifies that with that understanding he signed. Now that is not denied by Mr. Hendrick. But to go a little farther, it seems that on May 11th, the next day after Mr. Hendrick procured this original option from Dr. Shumway, he made the agreement with the complainant in this case to sell him that land for $3,000. He then represented himself to be the agent of Dr. Shumway and gave to Mr. Cameron a receipt for $1,000, which Mr. Cameron then paid down, as follows:

"'$1,000.

"'Received of Mr. Lowry Cameron the sum of one thousand dollars to apply on the purchase price, $3,000, of lot, etc. (describing the premises), the balance of the purchase price, $2,000, to be paid on or before November 1, 1904, with interest, warranty deed to be given upon the payment of balance of purchase price, $2,000, which is to be paid on or before November 1, 1904, abstract and tax history to be furnished when deed is given.'

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"Then follows an erasure. The testimony does not show what originally appeared there, but there is a part of one line erased. 'Dated, Lansing, Mich., May 11, 1904. F. W. Shumway, per F. H. Hendrick.' The testimony shows that Mr. Hendrick had no more authority to act as the agent of Mr. Shumway in respect to that land than the court has at this moment. He deceived Mr. Cameron and he did not give the slightest intimation to Dr. Shumway that he had sold that land, did not disclose the situation at all to him at the time he procured this extension of that option June 28th.

"Now, in view of his conduct in respect to that transaction, he does not stand on an equal footing in respect to his testimony with Dr. Shumway at all, and I think that I must find as a matter of fact that Dr. Shumway has given the true version of the agreement between him and Hendrick in respect to this land, that he was to have the right to contest those taxes under the first option and under the last option. In addition to that I might say that I think no court of chancery on an attempt to enforce the specific performance of a contract of that kind, even in the absence of a specific agreement in respect to that, would compel the voluntary paying of taxes which in amount were nearly 33⅓ per cent. of the value of the assessed value of the land, and if we add some more that accrued since that time, nearly 66 per cent. of the assessed value of the land, I think the sewer taxes, making about $400 as I remember the testimony, it would be, but be that as it may, under the contract, I am satisfied that Dr. Shumway was entitled to contest those taxes, and it appears to me, of course, this is outside of the case itself, because I am not passing upon it now, but I may say in passing that from the testimony in this case, I have no doubt but that those taxes were void.

"Now it is the contention of the complainant that Dr. Shumway is estopped from making any defense of the kind that he interposes by reason of his conduct. As I understand the doctrine of estoppel, in order to invoke it, the party against whom it is sought to use it must have done something which has led the other parties to do something on his part which has been to his disadvantage and by reason of which he will suffer loss. That is not the case here. Mr. Cameron paid his $1,000 before Dr. Shumway ever opened his mouth in regard to this transaction. As a matter of fact, since the doctor has written

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these letters, since he has had these conversations, Mr. Cameron has gained the advantage in that Mr. Hendrick has returned to him $100 of the $1,000. He has benefited by what the doctor has done instead of having suffered a loss. Under the contract as I find it to exist—of course, complainant would not be entitled to a decree for specific performance. There are other reasons aside from the one I assign why he would not be entitled to it.

"The contract which was assigned to Mr. Cameron on November 28, 1904, provides that 'When said balance is paid (that is the $2,000) a warranty deed of said property is to be given.' In my judgment he would only be entitled to that deed after he had actually paid that money or actually tendered it on condition. I cannot find that the cases cited in respect to offender of that kind have application to this. This is a one-sided contract. It simply gives a man the right to make a purchase if he sees fit to do so. There is no way in the world that the grantor can force him to take that property. Therefore, there is no obligation upon the part of the grantor to make any tender of anything, because he can force nothing, he can accomplish nothing, but the duty devolves upon the other party to accept that contract. Counsel says suppose it had been a $100,000. Perhaps that might be unfortunate in some cases, but it is a contract. Suppose on the other hand the option had been to sell a $100,000 of negotiable bonds, was seller obliged to let the other man run away with them? I am certain it is not the contract. There is another reason in my judgment. Whatever may be said about the sufficiency or legality of that tender, the undisputed testimony shows that it was made late in December, and the testimony of Dr. Shumway shows about the first of January, confessedly about thirty days after the expiration of the time limited in this option, in my judgment it could not be enforced for that reason because the offer to perform and the acceptance of the terms of the option itself must be made within the life, within the time specified in the option. And for all those reasons in my judgment the complainant's bill must be dismissed. However, having been satisfied in open court that the defendant did not desire to enforce any forfeiture, and in my judgment it would be inequitable that he should, the decree will also provide that he return Mr. Cameron the moneys that have been paid, I think it is $439 and some cents, I am not sure as to the exact amount,

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the interest and the $400. I think that is about justice and it has been consented in open court that he did not want to retain it, and would consent that it be returned and so the court will provide by its decree that this bill shall be dismissed, providing, however, that Dr. Shumway shall return this money within 90 days to Mr. Cameron, without interest. The costs to be taxed in favor of the defendant and the solicitor may prepare a decree in accordance with what I have said."

A decree was made in accordance with the opinion. The complainant has brought the case here by appeal. The defendant did not appeal. The case is carefully briefed. Complainant claims that all of the parol testimony in relation to the contesting of the taxes was improperly admitted because the option is a complete instrument in and of itself; citing many authorities. On the part of the defendant it is insisted that the testimony was proper under the facts shown in this case, counsel citing many authorities. We do not think it necessary to decide the question.

The record shows very clearly that the defendant never authorized Mr. Hendrick to sign the written agreement which was made by him with complainant, May 11, 1904. He simply gave Mr. Hendrick in the first instance "an option to July 1, 1904, to purchase of me for the sum of $2,500" certain land. It was signed by the defendant, but was never accepted in writing by Mr. Hendrick. On the 28th of June, 1904, another option was given running up to September 1, 1904, in which the following language is used:

"The said $200 is to be applied on the purchase price so that only $2,300 is to be paid on or before September 1, 1904, and when said balance is paid a warranty deed of said property is to be given and an abstract to date of transfer furnished showing perfect title, also a tax history is to be furnished."

This was signed by the defendant but was never accepted in writing by Mr. Hendrick. September 8, 1904, there was indorsed on the option the following:

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"For and in consideration of the sum of $200, to me in hand paid, I do hereby extend the above option to December 1, 1904, at which time the balance, $2,100, will be due.

"Dated Lansing, Mich., September 8, 1904.

"F. W. SHUMWAY."

Later there was indorsed upon the option the following:

"For a valuable consideration I do hereby sell, assign, and transfer all my right, title, and interest in the within optional contract to Lowry Cameron.

"Dated Lansing, Mich., November 28, 1904.

"FRANK H. HENDRICK."

There was not on December 1, 1904, nor at any time previous thereto a written acceptance of said option by either Mr. Hendrick or Mr. Cameron, nor was there a payment made of the balance due or a tender made of the amount thereof. By the express terms of the option it was not until the payment was made that Mr. Hendrick was entitled to a deed and abstract.

The papers which had been signed by the defendant did not bind Mr. Hendrick to accept the option, and when he failed to do so on or before December 1, 1904, the defendant had no remedy against him. When Mr. Cameron took an assignment of the option, he obtained nothing more than was possessed by Mr. Hendrick, to wit, the right to pay the balance due according to the option on or before December 1, 1904, and when the balance was paid, to have a warranty deed with abstract showing perfect title, also a tax history. He did not see fit to make this payment, but, on the contrary, refused to make it until a warranty deed was executed and an abstract and tax history furnished. In *Myers* v. *J. J. Stone & Son*, 128 Iowa, 10, the following language is used:

"Generally an option may be defined as a contract by which the owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a limited time. * * * It is neither a sale of land nor an agreement to sell, but merely the disposal of a privilege of electing to buy at a fixed price within the

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time limited. The other party acquires no lands, nor interest in land, not even a chose in action, prior to his election, but he does obtain, what is often of much value, the privilege, at his election, to demand and receive the conveyances of land."

See, also, *Litz* v. *Goosling*, 21 L. R. A. 127, and note (93 Ky. 185); *Potts* v. *Whitehead*, 23 N. J. Eq. 512; *Weaver* v. *Burr*, 31 W. Va. 736 (3 L. R. A. 94); *Harding* v. *Gibbs*, 125 Ill. 85; *Eggleston* v. *Wagner*, 46 Mich. 610; *Chapman* v. *Morgan*, 55 Mich. 124; *Gustin* v. *School District*, 94 Mich. 502; *Dunn* v. *Dunn*, 132 Mich. 461.

The decree is affirmed, with costs.

McALVAY, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

GRINDLING v. REHYL.

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SPECIFIC PERFORMANCE—PAROL CONTRACT TO DEVISE—PART PERFORMANCE—STATUTE OF FRAUDS—PART PAYMENT.

Specific performance of a parol contract to devise land will not be granted, though a will was executed in pursuance of the contract and has been denied probate on the ground of implied revocation by marriage and birth of issue, where complainant has done nothing by way of performance except to pay the agreed consideration.

Appeal from Livingston; Miner, J. Submitted June 17, 1907. (Docket No. 104.) Decided October 4, 1907.

Bill by Edith Durfee Grindling against Richard Rehyl, administrator of the estate of Anna B. Risch, deceased,

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and Charles Risch, individually, and as guardian ad litem of Anna E. Risch, for the specific performance of a parol contract. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

Shields & Shields, for complainant.

Louis E. Howlett, for defendants.

MONTGOMERY, J. This bill is filed for the specific performance of a parol contract. The bill avers that complainant, who was formerly Edith Durfee, and Anna B. Durfee, decedent, were sisters; that decedent was the owner of the described forty acres of land and of three-eighths of an adjoining forty, subject to the life estate in the father and mother of the parties; that decedent, Anna B. Durfee, was living at home on these premises with the father and mother, caring for the parents, and that it was agreed that decedent should take this care of the parents, and that complainant should provide for the care and maintenance of said decedent and should furnish money to Anna B. Durfee with which to buy food, provisions, and clothing, and pay the running expenses of the household, and that complainant when not teaching should make her home with said decedent and their parents, as aforesaid, and in consideration of the services performed by complainant, and in consideration of the money furnished to said Anna B. Risch, then Durfee, by complainant, and to be furnished to her, said Anna B. Durfee did then and there promise and agree that at her death she, the said Anna B. Risch, then Durfee, would leave all her property of whatever nature, whether real, personal, or mixed, to complainant.

The bill further avers that from that time until the death of said Anna B. Risch complainant furnished large sums of money, including her total income and the food, clothing, and provisions and everything requisite to keep said Anna B. Risch, then Durfee, in comfortable circumstances, including living expenses, clothing, spending

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money, and the usual pleasures of ladies in her circumstances of life; and that said complainant did furnish the sum of $200 per year from the time of said agreement up until the death of said Anna B. Risch, and during all that time said Anna B. Risch, then Durfee, lived at home under the contract and agreement so made as aforesaid; that complainant relied upon said contract and agreement so made with Anna B. Risch, then Durfee, and in pursuance of said contract said Anna B. Risch, then Durfee, did on the 27th day of March, 1902, execute a will leaving to complainant all of her property, etc. The bill avers that the will was refused probate on the ground that it had been impliedly revoked by law because of the marriage of said Anna B. Risch and the birth of issue to her. The bill prays that the title to the land be decreed to be in complainant. A demurrer to this bill was sustained, and complainant brings the case here for review.

It will be noted that no possession of the premises in question was given to complainant under the verbal agreement alleged, nor is there anything in the bill showing that any improvements were placed upon the premises involved in this suit. All that the bill avers is that the complainant has parted with money under this verbal agreement; in other words, that the consideration price for the contract has been paid. It is generally held that the mere payment of a consideration by the purchaser which is susceptible of being compensated by damages is not sufficient to take a case out of the statute of frauds. *Farnsworth* v. *Coots*, 46 Mich. 117; *Kelly* v. *Kelly*, 54 Mich. 30. One reason why the taking of possession of land and making improvements upon it is held to be such part performance as takes the case out of the statute is that the possession is of itself some evidence of ownership. *Riddell* v. *Riddell* (Neb.), 97 N. W. 609; *Kelsey* v. *McDonald*, 76 Mich. 188.

We are cited to the case of *De Moss* v. *Robinson*, 46 Mich., at p. 65. The citation is to the dissenting opinion; the majority opinion of the court is found at page 62. In

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the majority opinion it was held that an oral agreement to devise property is revocable during the testator's lifetime and is not itself valid if it covers real estate, and that one who pays money on such an agreement may recover it back either by himself or by his personal representative. So in *Gould* v. *Mansfield*, 103 Mass. 408, it was held that the making of a will by the complainant under an oral agreement to make mutual wills was not such performance as to take the case out of the statute. The court said:

"Such an instrument is ambulatory and might have been revoked by various acts or by implication of law from subsequent changes in the condition or circumstances of the testator."

We are cited also to the case of *Carmichael* v. *Carmichael*, 72 Mich. 76–85, which is said to be a parallel case. In that case Charles Carmichael and his wife, Ann, agreed to make mutual wills which should not be revoked during the life of either. This promise was in part an oral one. Charles, Sr., died so that his will was not revoked and took effect. After his death Ann Carmichael in form conveyed the lands in question to two other defendants. This was done at a time when she was mentally incompetent, so that she had never revoked her will when the bill was filed, and as the court said was incompetent to do so. The husband had not revoked his will prior to his death. The court found in that case that the performance of the contract on the part of Charles was sufficient to take the case out of the statute of frauds. That case differed from this in that there was no way in which Charles could be placed in statu quo. The provision which by his will he had sought to make for his children would fail unless the contract with his wife were specifically enforced, and the court held that these beneficiaries had such an interest in the will as entitled them to have the fraudulent overreaching of Ann Carmichael set aside and permit the two wills to stand. In the pres-

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ent case complainant, if the averments of the bill be true, can be fully compensated in damages. We think the demurrer was properly sustained. *Peckham* v. *Balch*, 49 Mich. 179.

The decree will be affirmed, with costs.

BLAIR OSTRANDER, HOOKER, and MOORE, JJ., concurred.

HEISS v. ADAMS.

ADVERSE POSSESSION — HARBOR IMPROVEMENT — UNITED STATES — EJECTMENT — LIMITATIONS.

After plaintiff had cut an artificial channel across his land, between Lake Michigan and Portage Lake, government engineers took possession of the channel and piers for the purpose of making a harbor of refuge, and for a period of over 20 years remained in hostile possession thereof, to the knowledge of plaintiff and his agents, and the government, through both the legislative and executive departments, repudiated his claim for damages repeatedly. *Held*, that he was barred by limitations from maintaining an action of ejectment against the government engineer in possession in behalf of the government.

Error to Manistee; Rose, J. Submitted June 17, 1907. (Docket No. 103.) Decided October 4, 1907.

Ejectment by Wilhelmina S. A. Heiss against Milton B. Adams, colonel of the United States army, in charge of the United States engineer's office at Grand Rapids, and the Portage Point Assembly. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Affirmed.

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Dwight Goss, for appellant.

George G. Covell and *William K. Clute*, for appellees.

BLAIR, J. This is an action of ejectment for the possession of certain lands alleged in the declaration to comprise eight acres in section 33, Onekema township, Manistee county, in this State. In November, 1866, the land in question was entered by Andrew T. Shanks and title conveyed to him by the United States. In April, 1871, the land was conveyed by Shanks and wife to Theodore Heiss, husband of the plaintiff herein, and, in September of the same year, Heiss conveyed the lands to the plaintiff, who still holds the record title thereof. Across the eight acres extends an artificial channel, which unites Portage Lake with Lake Michigan, and which was constructed in 1871. The defendant Adams is a colonel of the United States Engineering Corps, having charge of the harbor improvements on the east shore of Lake Michigan, and is made defendant by reason of his official position.

Prior to 1871, the outlet of Portage Lake was a creek about a mile north from the present channel. The old channel through the creek was used principally for logs, although, before the mill and dam were built, small boats went through. When the dam was built, it prevented boats from passing, but logs were still run through the channel.

When plaintiff's husband constructed the channel through his lands, it reduced the level of Portage Lake about eight feet, so that the original outlet became dry land and has so remained ever since. Since 1871 the only outlet from Portage Lake to Lake Michigan has been through the present channel. Plaintiff's husband, who caused the construction of the present channel in 1871, testified:

"I had men employed to open a ditch. I was not there personally. I had a man by the name of Schroeder who was united with me in the effort or job to open the chan-

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nel to ship timber through. That was our principal object, * * * and while they were making this ditch I did not stay there but went to Milwaukee and left the work to Mr. Schroeder, my partner in business at the time.

The digging of the ditch—

"Washed a channel 45 feet deep; a United States steamer sailed in through it the next day and that was the result of my work. * * * The width of the land which I bought from north to south was 35 rods, and the distance from one lake to another was about double this distance, about 70 rods. * * * I remained there about a week, I should judge, and then retired back to Milwaukee and left the business to my man there. * * * I paid the taxes as long as I could get the notice of the assessment sent to me. * * *

"*Q.* You say that each year since 1871 until the present time you have made inquiry with reference to the taxes?

"*A.* Yes, sir."

In 1884 plaintiff received notice from the assessor, "that *the government had taken possession of my land* and there was no assessment on it nor would there be." After ascertaining that the government was making improvements, plaintiff's husband made efforts to obtain compensation for the lands covered by the improvements, through the President, the war department, and Congress. Plaintiff's husband paid $163.88 for the entire tract of 8 acres. The government improvements occupied about 1½ acres. The bills in Congress, introduced at the request of plaintiff's husband, recited that, "the damages sustained by the said owner by the said taking and appropriation amounts to eighty thousand dollars ($80,000)," and appropriated that amount "in payment of the said damages and for the said appropriation." These bills were introduced at every session of Congress from 1884 to 1891.

"*Q.* Did those congressmen who introduced those bills for you tell you they could get the bills through?

"*A.* They all told me they would try their utmost but could not give me any assurance, and they did try hard, too."

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On June 13, 1885, Mr. Heiss received a letter from the office of the chief of engineers, stating "that the State land map shows that the present channel is entirely north of the north line of section 33, and is therefore not covered by the land claimed by you." On November 25, 1885, he received a letter from the United States engineering office at Grand Rapids, in this State, as follows:

"*Sir:* Your letter of the 23d inst. has been received this a. m. The mistake made in locating the land claimed by you at Portage Lake was due to the defective construction of a map on file in this office and which at this time was supposed to be correct. This, I think, has been stated before. By section 5498, Rev. Stat. United States, I am prohibited from furnishing you any information whatever on your claim. 'Common courtesy' has nothing to do with the matter at all."

On May 17, 1886, Mr. Heiss received the following letter:

"*Dear Sir:* The President has received your letter of the 11th inst., but as the matter concerning which you write has been investigated by the war department, under whose supervision it belongs, and as the secretary of war is of the opinion that you have no just claim against the United States, the President is not disposed to interfere with the action already taken nor to institute further proceedings in the case.

"Your enclosure is herewith returned.

"Very respectfully,

"J. L. LAMONT,

"Private Secretary.

"THEODORE HEISS, Esq.,
"Milwaukee, Wis."

On July 29, 1903, Mr. Heiss received a letter from the secretary of war, as follows:

"*Sir:* Answering your letter of 20th instant, in which you again call attention to your claim for damages for the alleged use of your property at Portage Lake, Michigan, in connection with the work of providing a harbor of refuge, I beg to inform you that the acting chief of engineers, U. S. army, has just submitted a report on the subject, as follows:

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"'The matter has been repeatedly before the department since 1885. It has received careful consideration, and the department has uniformly held that Mr. Heiss has no just claim against the United States, and that if he had, the claim is one which the department is not required to adjust.'

"In view of the foregoing, and the fact that the claim has also been considered by Congress, the department is unable to afford any relief in the premises.

"Very respectfully,
"ELIHU ROOT,
"Secretary of War.

"Mr. THEO. HEISS,
"No. 4 Worth street,
"San Francisco, Cal."

Mr. Heiss purchased the land for the sole purpose of making a channel to transport tanbark and timber, for which he had secured contracts.

"*Q.* You have never seen the channel at all?
"*A.* Never the government channel."

The last time that Heiss was at the place in question was in the summer of 1872. During all the time from 1871 down to the present time, plaintiff and her husband had been nonresidents of the State of Michigan.

"*Q.* Did you pay a tax in 1877 on a valuation of $44.60 for the purpose of assisting in working on that channel?
"*A.* A tax? That is an infernal lie, whoever said it—I did not.
"*Q.* Was there another district laid out in 1877 that was assessed for carrying on this work?
"*A.* I know nothing about it. * * *
"*Q.* Do you claim to be the only man that ever did any work or ever paid for work in opening that channel?
"*A.* Yes, I do, certainly. I had a partner there. He might have paid something without my knowing it. * * * The south pier is not on my land but the north is."

He also testified that if any one used the channel, it was against his will. Mr. Schroeder, Heiss' partner, testified:

"I was well acquainted with Mr. Heiss; in 1871 I entered into business relations with him; we were to buy

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bark, wood, lumber or anything we could make money on. I proposed that we dig a channel where the present channel is. All right, he said, we would go into it. He would put in the money if we would dig the channel. I had no talk with Heiss about it, but I told the people that it was to be a free public channel waterway for everybody. He did not say anything that the people should help dig it; he depended on me to dig the channel. Andrew Shank asked me if it was going to be free to everybody. That was before he gave Heiss a deed. I told the people it would be a free open channel. This channel that was talked about as being free and open to everybody was upon the present site of the channel between Portage Lake and Lake Michigan. People up there contributed lumber and labor in the way of building cribs and piling. Voluntary labor put it in a navigable condition so that boats could run between the two lakes.

"About 1877 a tax was proposed upon Onekema township and levied. It was used to drive piles and build cribs to protect the harbor. The pier on the north side stands upon ground that was covered by water. I signed a petition asking the general government to improve that channel. Government improvements were started there about 1880 or 1882. Since the channel was first put through in 1871 it has been used, except when it was filled up with soil, for the passage of all kinds of boats between Portage Lake and Lake Michigan. Portage Lake is a harbor of refuge and has been for many years. I have been through that channel every year since 1871 on boats and no one ever collected any tolls on the channel that I know of."

In 1871, as shown by the records of the proceedings of the board of supervisors of Manistee county, a license for operating a public ferry across this channel was granted by the board of supervisors to Andrew T. Shanks. Mr. Shanks operated this ferry for several years. His widow, who, at the time she testified, was Mrs. Anna Graham, testified that Heiss said that the channel would be open to everybody. She also testified:

"*Q.* Did you see a petition or, rather, whether Heiss talked about a petition he was circulating and got signatures to it to send to Washington to have the government improve the channel?

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"*A.* Yes, sir.
"*Q.* Did you see that?
"*A.* Yes, sir.
"*Q.* Did you see Mr. Heiss circulate it?
"*A.* Mr. Heiss had it at the time I saw it. That is all I know about it.
"*Q.* What did he say with reference to sending that petition to Washington?
"*A.* I don't remember what he said, only he said he was going to send it to Washington."

Since this channel was put through, with the exception of such times as it has been shoaled in temporarily with sand, it has been used by boats of every description for general navigation purposes. Part of the pier on the north side of the channel has been there since 1879 and some government officer has been in continuous possession of the pier property there ever since. Boats from other States and points in Michigan use the harbor. The lands north of the north pier are in possession of no one, so far as this record discloses. The defendant Adams is only in possession for the United States of the north and south pier property. The channel is open for such use for navigation as the public sees fit to make of it in the way of domestic, interstate, or foreign commerce.

The assessment roll for Onekema township for 1877 shows that the premises in question were assessed upon a valuation of $44.70. "State tax, 11c; school tax, 9c; harbor tax, 45c; total tax, $1.98. Paid by Mr. Heiss." The receipt for the payment of this tax was put in evidence by plaintiff's counsel, and the record in the treasurer's office shows its payment. In 1879, Congress made an appropriation of $10,000 for the purpose of maintaining and improving the channel at Portage Lake, and soon after commenced to improve the channel, and ever since has carried on the work, expending thereon, up until the commencement of this suit, in 1905, a total sum of $369,500.

A map was made in 1878 before the government did any work upon the channel. At that time, the channel existed there between imperfect piers built by local enterprise.

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At the close of the testimony, the court directed a verdict in favor of defendants, upon the ground, "that she rested upon her rights so long that the statute of limitations had run, and that after the statute of limitations had run against her claim she could not maintain a suit in this court for the possession of the premises." The plaintiff has brought the record to this court by writ of error, to review, under appropriate assignments of error, the court's direction of a verdict.

We agree with the circuit judge that this action was barred by the statute of limitations. For over 20 years, the defendant and his predecessors, as shown by the undisputed facts, were in the "actual, continued, visible, notorious, distinct and hostile possession" of the property, to the knowledge of the plaintiff or her husband, who represented her. The executive and legislative branches of the Federal government uniformly repudiated his claim and denied its justice. The United States officers in charge of the harbor improvements continued their work in defiance of plaintiff's claims, and the courts were open to him to establish his rights. Having neglected to avail himself of the right to bring his action within the period prescribed by statute, he lost the right to prosecute his suit.

The judgment is affirmed.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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PEOPLE v. CHAMBLIN.

1. CERTIORARI — WRIT — AUTHORITY TO ISSUE — CIRCUIT COURT COMMISSIONERS—STATUTE.

   Act No. 310, Pub. Acts 1905, providing for review by certiorari of rulings on motions to quash, intends that the Supreme Court shall have exclusive authority to issue the writ, and the issuance of a writ by a circuit court commissioner is unauthorized.

2. SAME—DISMISSAL—MERITORIOUS QUESTION—DECISION.

   Though the writ of certiorari in this case is dismissed because issued by a circuit court commissioner without authority, it is regarded as an application to this court for a new writ, and the meritorious question involved therein decided, a speedy determination of the issue being demanded by the interests of both the applicant and the people.

3. CRIMINAL LAW—PRELIMINARY EXAMINATION—TESTIMONY—SUFFICIENCY—ASSAULT WITH INTENT TO RAPE.

   Testimony that respondent committed an assault upon a female under the age of 16 years, with intent to have sexual intercourse with her, justifies the examining magistrate in binding him over to the circuit court for trial on a complaint and warrant charging him with assault with intent to commit the crime of rape. (Sections 11489, 11490, 3 Comp. Laws.)

4. SAME —COMPLAINT AND EXAMINATION — VARIANCE — EFFECT—INFORMATION.

   That the testimony taken on an examination on a complaint charging respondent with assault with intent to commit the crime of rape upon a female under the age of 16 years "by force and against her will" fails to show that any force was intended is immaterial, since the information filed may properly omit the unnecessary charge of force, so long as it is based upon the same transaction.

5. CERTIORARI—STATUTE—APPLICATION—CRIMINAL CASES.

   Whether Act No. 310, Pub. Acts 1905, providing for review by ceritorari of rulings on motions to quash, authorizes a certiorari to review the denial of a motion to dismiss a criminal case upon the ground that the examination does not show reasonable cause to believe that the offense charged in the complaint and warrant was committed, is not decided.

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Certiorari to Barry; Smith, J. Submitted June 13, 1907. (Docket No. 122.) Decided October 4, 1907.

Thomas L. Chamblin was arrested and bound over for trial in the circuit court on a charge of assault with intent to commit statutory rape. There was an order denying a motion to quash, and he brings certiorari. Dismissed.

Colgrove & Potter, for appellant.

Lee H. Pryor, Prosecuting Attorney, for the people.

CARPENTER, J. Upon the charge that respondent had committed an assault with intent to commit the crime of rape he was apprehended, examined before a justice of the peace, and bound over to the circuit court. The charge in the complaint and warrant was that respondent "upon * * * Ada Grondine, a female of the age of less than 16 years, to wit, the age of 15 years, * * * feloniously did make an assault with intent, her, the said Ada Grondine, by force and against her will, then and there feloniously to ravish and carnally know." Before an information was filed in the circuit court, respondent's counsel asked that court to dismiss the case upon the ground that "the examination of the complaining witness, Ada Grondine, * * * does not show that the offense charged in said complaint and warrant was committed, or that there is reasonable cause to believe that it was committed." This motion was denied. He thereupon obtained an allowance of a writ of certiorari from a circuit court commissioner for the county of Barry, and urges that it is made the duty of this court, by Act No. 310 of the Public Acts of 1905, to review the ruling of the circuit court.

The first question which arises on this record is this: Had the circuit court commissioner for the county of Barry authority to allow said writ of certiorari? Manifestly that depends upon a proper construction of Act No.

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310 of the Public Acts of 1905. That act, so far as material to the question under discussion, reads:

"Whenever in any action at law in a circuit court a motion to quash the writ * * * upon jurisdictional grounds * * * shall be decided adversely to the party filing such motion * * * the decision may be reviewed by writ of certiorari forthwith. Upon the issue of such writ the Supreme Court may, upon proper cause shown, stay the proceedings in the circuit court pending their decision on such writ."

This reference to the Supreme Court sufficiently manifests the intent of the legislature to give to that court exclusive authority to determine whether such writ of certiorari shall issue. The circuit court commissioner had, therefore, no authority to allow said writ and the writ must for that reason be dismissed. As the result of dismissing said writ for the above reason will almost certainly lead to an application for a new writ from this court, and as the interests of the people and respondent, each demand a speedy determination of the issue, we think it our duty to regard the case before us as such an application, and to dispose of the meritorious question involved, viz., Did the examination show that there was reasonable ground to believe respondent guilty of the offense charged in the complaint? The complaining witness testified:

"I will be 16 years old the 29th day of July, next. The respondent came to my house on the 6th day of March, 1907. That was the first time I ever saw him. He came alone, and I was alone at the time. * * * He went up by the stove and began to pull his money out of his pocket. He said, 'Do you want to earn a dollar?' and I said, 'No, sir; I don't.' Then he came up to me and tried to put his hand up under my clothes. He took hold of my arm with one hand and tried to put his other hand under my clothes and I jerked away from him and told him if he didn't go away I would have him arrested."

From this testimony it is to be inferred that respondent committed an assault upon the complaining witness; that

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he did so with the intent of having sexual intercourse with her and that she was at that time less than 16 years of age; but the claim is now made that it cannot be inferred from this testimony that respondent intended to use force to accomplish his purpose, and that without proof of that intent he cannot be convicted of the crime charged in the complaint and warrant. As the complaining witness was under the age of 16 years, respondent would (see section 11489, 3 Comp. Laws) have been guilty of the crime of rape, if he had sexual intercourse with her, even though by her consent. And if, when he committed the assault, respondent intended to have sexual intercourse by such consent, he was, under section 11490, as construed by this court in *People* v. *McDonald*, 9 Mich. 150, guilty of an assault with intent to commit the crime of rape.

While respondent's counsel concede this, they contend that in the complaint and warrant the crime is charged in such language as to compel the people to prove an intent to use force to accomplish the contemplated rape. They do not contend that it was necessary to use such restrictive language. Indeed, they concede, and it was settled by *People* v. *McDonald*, supra, that that was unnecessary; but they do contend that the allegation having been "made unnecessarily minute in the description, the proof must satisfy the descriptive as well as the main part." If this contention is well taken—and whether it is or not we do not determine—we answer it by saying that in the circuit court the prosecuting attorney may file an information against respondent which is entirely free from the objection made to the language of the complaint and warrant; for it is settled that "so long as the information was based upon the same transaction it need not charge the same precise offense named in the original warrant of arrest." *People* v. *Stockwell*, 135 Mich. 341. There is, therefore, no ground for issuing the writ of certiorari, and the writ heretofore issued will be dismissed. To prevent a possible misapplication of the principles of this decision, we think it proper to say that in stating the

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foregoing reason for denying respondent's application, we do not decide that such grievances as his can, under any circumstances, be reviewed under Act No. 310 of the Public Acts of 1905.

McALVAY, C. J., and GRANT, HOOKER, and MOORE, JJ., concurred.

J. W. REEDY ELEVATOR MANUFACTURING CO. *v.* PECK.

1. MECHANICS' LIENS—CONTRACTS — PERFORMANCE — EVIDENCE — SUFFICIENCY.

On a bill to enforce a mechanics' lien for furnishing and installing a hydraulic elevator in defendant's hotel, evidence examined, and *held*, to show that defendant performed her contract to furnish a water pressure of 80 pounds per inch, and to show that complainant did not perform its guaranty to furnish a pressure relief attachment such that the pressure in the city water mains would not vary to exceed five pounds per square inch when the elevator was stopped, which was the inducing cause of defendant's entering into the contract.

2. SAME—CONTRACTS—NONPERFORMANCE—RECOUPMENT.

Though the mechanics' lien law expressly provides that the owner "shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract" (section 10710, 3 Comp. Laws), a decree awarding complainant a lien for the contract price less defendant's damages is not warranted by the pleadings where no such issue is presented by the answer, and no amendment was asked or ordered as authorized by section 10736, 3 Comp. Laws; and it appearing from the proofs that complainant failed in performing its contract, the bill should be dismissed.

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Appeal from Emmet; Shepherd, J. Submitted June 19, 1907. (Docket No. 65.) Decided October 4, 1907.

Bill by the J. W. Reedy Elevator Manufacturing Company against Blanche T. Peck and others to enforce a mechanics' lien. From the decree rendered, complainant appeals. Modified and affirmed.

Carroll, Kirwin & Hollway, for complainant.

C. J. Pailthorp, for defendants.

BLAIR, J. This suit was commenced by bill in equity to establish and foreclose a mechanic's lien claimed to be due for installing a hydraulic elevator in the defendant's (Blanche T. Peck's) hotel at Petoskey. The defendant Blanche T. Peck entered into a contract with complainant for the installation of the elevator, the portions of which material to the present inquiry are as follows: Complainant agreed—

"To furnish and erect in your building known as the Arlington Hotel at Petoskey, Mich., one of our best and latest improved high speed safety passenger elevators, to be operated by water pressure obtained from the city main, 80 lbs. per square inch pressure. * * * The elevator will have a lifting capacity of 1,500 lbs. exclusive of the weight of the car, and have a maximum speed of 200 feet per minute with a load of 750 lbs. * * * The valve will have a 4-inch supply and 4-inch exhaust. * * * The supply pipe to cylinder to be 4-inch diameter. The exhaust pipe to be 4-inch diameter. * * * The above price also includes one of our latest improved pressure relief attachments, erected in building complete, you to make pipe connections to same. With this device of attachment, we will guarantee that the water pressure in the city mains will not vary to exceed 5 pounds to the square inch when the elevator is stopped."

Complainant alleged that the contract had been fully carried out upon its part and that the contract price had become due and payment refused. The defendant Blanche T. Peck, by her answer, admitted the contract

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as set forth, but denied that complainant had performed the contract, alleging, among other things, that when the elevator would stop, the pressure in the city mains varied from 30 to 60 pounds.

"And in consequence of said variation and the danger incident therefrom, the city authorities refused and still refuse to allow said defendants or any of them to use sufficient water to operate said elevator; and these facts have been repeatedly brought to the attention of said complainant by said defendants, with the request that said complainant carry out its said agreement with the said defendants by equipping said elevator so that when operated by water taken from the said city mains with a water pressure that shall not vary to exceed 5 lbs. to the square inch when said elevator is stopped, said elevator shall have a lifting capacity of 1,500 lbs., exclusive of the weight of the car, and have a maximum speed of 200 feet per minute with a load of 750 lbs., and that said complainant had neglected and refused to so equip said elevator without an additional compensation of several hundred dollars, which said defendants declined to pay.

"The said defendants, further severally answering, allege that said elevator has been and is a source of great annoyance and damage to said defendants, and that in its present condition, and the condition in which it was left by said complainant, it is of no value to said defendants or either of them; and that said elevator has never been accepted by said defendants or any of them. They severally deny that they or either of them are indebted to said complainant in any sum whatever. They severally deny that said complainant was or is entitled to a lien on the property described in complainant's bill of complaint or any portion thereof."

The decree contains, among other things, the following findings of fact by the circuit judge:

"There is considerable variance in the testimony of witnesses as to the extent of the disturbance in the city water mains caused by the operation of the elevator in question; but all agree that the pressure in the city water mains varied much more than the five pounds to the square inch when the elevator was stopped, resulting in what some of the witnesses called a 'water-hammer,' caused partly by the sudden stoppage of the flow of water

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from the city reservoir and partly by the momentum of the machinery at the pumping station. The use of the elevator, while carrying its load, of so large a quantity of water from the mains, caused the machinery to increase its speed very much, and this machinery being operated by water power was very heavy, and the inertia correspondingly great. The machinery did not, of course, cease this rapid motion instantaneously upon shutting off the water at the elevator valve, thereby causing a great increase of pressure, resulting in weakening and bursting of mains, loosening of joints and packing, and various other disturbances; so the city refused to allow defendant to continue the use of the elevator except by cutting off the supply of water to about one-fifth the 4-inch opening stipulated in the contract, lessening thereby very much its capacity.

"Complainant claims it was the duty of the defendant under the contract to furnish enough water and under sufficient force to maintain a constant pressure of 80 pounds per square inch. That if this had been done, there would have been no 'water-hammer.'

"Defendants say that if they agreed to anything it was merely to furnish the water in the 4-inch opening under pressure of 80 pounds at the instant of starting the elevator.

"From the view I take of the case, it is immaterial which party was in default, or rather, which, if either party, agreed to maintain the constant pressure of 80 pounds. I am not satisfied from the evidence that the 'water-hammer' so-called, was caused by such default. It seems to me to have been more the result of the peculiar construction of the water works. This elevator while fully loaded consumed a large portion of the entire capacity of the pumps. Even if the pressure was maintained, the sudden closing of the valve would, under the circumstances, cause a rise in pressure much beyond the capacity of the device provided, and which absorbed only a few gallons of water.

"Complainants made their proposal with knowledge of the peculiar construction of the city water works plant. So I find that complainant has failed to furnish such an elevator as the contract required it to furnish, and defendants may set off or recoup from the contract price of the elevator their damages for breach of warranty."

Previous to the making of the contract in question,

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trouble had arisen from the use of a hydraulic elevator in another hotel in Petoskey known as the Imperial Hotel, and had disclosed the fact that, owing to extreme and sudden changes in the pressure in the water mains, the operation of a hydraulic elevator with water taken directly from the mains was attended with danger to such mains and the pumping machinery. At the time of executing the contract, and for several years prior thereto, there was and had been an ordinance adopted by the common council prohibiting the operation of hydraulic elevators in the city with water taken directly from the city mains.

After a careful consideration of all the testimony in the record, we agree with the circuit judge that the entire situation was explained to and understood by the complainant's agent, Rice, at the time of making the contract with defendant Blanche T. Peck. In consequence of the objections of the superintendent of the city water works and board of public works that the installation of the elevator would endanger the pumping machinery and water mains, complainant's agent, Rice, consulted with said superintendent and board of public works and assured them, as well as defendant Blanche T. Peck's husband, who was the manager of the hotel for her and represented her in making the contract, that this difficulty would be obviated by the appliance which he proposed to attach to the elevator. These assurances led the public authorities to consent to the installation of the elevator in the Arlington Hotel and induced the defendant to enter into the contract.

The superintendent of the water works testified as to the results after the water was first turned on to operate the elevator in question.

"After I turned on the water I returned to the water works as soon as I could get there.

"*Q.* Well, what, if anything, did you notice after you got to the water works?

"*A.* Why, we had a great variation of pressure. I

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was afraid of a damage to the pumps and went right back and turned it off again.

"*Q.* What was the variation?

"*A.* Well, while that valve was wide open, there was about 50 or 60 pounds at the works.

"*Q.* Did that variation take place when the elevator was stopped?

"*A.* When it was started and stopped both.

"*Q.* Both?

"*A.* Yes, sir.

"*Q.* Well, would there be any difference in the variation in the pressure at starting or at stopping?

"*A.* The starting was not injurious because it decreased the pressure, but the stopping was injurious because it increased it.

"*Q.* So that the injury came from the stopping of the elevator?

"*A.* Yes, sir.

"*The Court:* What variation?

"*Mr. Kirwin:* At the works.

"*Witness:* 50 or 60 pounds, depending upon the lift of the elevator. A short lift was not as bad as a long one.

"*Q.* That would indicate what? That there was that much variation in the pressure in the mains?

"*A.* Yes, sir.

"*Q.* What damage, if any, did this variation do to the property of the city?

"*A.* Caused leaks in the mains and damage to the pumps, through loosened balance wheels and couplings and gear wheels, blowing out valves and packing. * * * There was tests made at the elevator for the purpose of showing the difference in the pressure in the pipes in Mr. Dunn's presence; I don't remember of their saying anything about obviating except their relief appliances that they put in there which was of no value as far as I could see; they made a claim that it would do it, but it did not. While they were operating the elevator I went with members of the board about the city from point to point, for the purpose of testing the variation of pressure in the pipes at different points, viz., sill cocks at the Arlington Hotel, Imperial Hotel and Rose's yard above the Arlington across the railroad track, perhaps 340 feet on an even line; we found the variation to be at these different points, when the elevator was being operated, about the same as it was at the station, about 60 pounds if the

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valve was open, but we seldom had the valve open, and we tried to hold it down to a variation of 20 pounds, that is, on the opening and closing of the valve.

"I remember Mr. Cook making some change in the construction or mode of operation of the elevator later, and the effect of the change was that it did away with the variation of pressure of 50 or 60 pounds and all our troubles as long as there was air in the tank; when there is air in the tank the variation of pressure is so slight that you could not notice it when they operated the elevator. * * *

"The location of the reservoir, stand pipe, was all gone over and he understood at that time it was a reservoir tank system here and he spoke about the St. Joe system and the elevator there in that connection, and in effect he said it was the small-pipe system in St. Joe and that the conditions there and the elevator they had installed was similar to the conditions here. * * * We went over the trouble with Mr. Rice, that we had with the other elevator, and we didn't want any more of it, so we guarded against it in this way. Mr. Rice guaranteed us we would have no trouble with this device, which I knew nothing of.

"*Q.* Now after this elevator was installed and after it began operations, how long was it in operation before your attention was called, or any complaint made, or you noticed any trouble—anything wrong?

"*A.* How long after the valve was first opened?

"*Q.* Yes.

"*A.* Just as fast as I could go from the Arlington Hotel to the pump station. * * *

"*Q.* When the elevator would begin its intake and begin to rise, there would be a decrease in pressure, would there?

"*A.* Yes, sir.

"*Q.* And that would be, I suppose, simply while the elevator was rising?

"*A.* And it would be very quick.

"*Q.* It would go down about how much?

"*A.* Well, it dropped about 100 pounds or 95, depending upon the operator in the elevator a good deal.

"*Q.* It would drop from what pressure to what pressure?

"*A.* From 125 with pumps running at normal speed—

"*Q.* To what pressure?

"*A.* To 95. * * *

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"*Q.* When the elevator would be stopped, what would be the effect?

"*A.* Run up to about 150 pounds pressure—sometimes 160—depending upon the operator."

In consequence of these conditions, the city authorities refused to permit the elevator to be operated with a 4-inch valve fully open, but inserted in the valve a bushing, decreasing its capacity to between one-fourth and one-fifth of its full capacity, which obviated the difficulties experienced, but so lessened the supply of water that the elevator could not be operated in compliance with the contract. Later on, defendant installed, in connection with the elevator, a compression tank, at considerable expense, which enabled defendant to use the elevator with the valve fully open.

It is agreed that the elevator plant itself worked satisfactorily when the valve was wide open, and it is the contention of complainant's counsel that the failure of the elevator to do its work after its installation was wholly due to the failure of the city authorities to furnish sufficient water to maintain a constant pressure of 80 pounds to the square inch with valve wide open; that the object of the pressure relief attachment was to take care of the water-hammer, so-called, and that, with a sufficient supply of water, it would have done so. Complainant's superintendent, Forslund, testified:

"*Q.* Mr. Cook and Mr. Peck both testify that when the Arlington Hotel elevator began to rise there was also a rapid increase of motion in the pumps—a racing of the pumps. Now what would that indicate?

"*A. That would indicate that the pressure in the pipes was reduced clear up to the pump;* and this reduction of pressure shows that a large quantity of water—or a quantity of water had been withdrawn from the pipes which the pumps are not able to take care of in the same length of time, while the water was being withdrawn therefrom; and this reduction of pressure in the pipes caused the pumps to accelerate in motion, because they had less head or load to operate against. As soon as the pressure began to rise—or, return to its normal condition

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—the pumps would not stop racing, on account of the momentum of its own parts. There is quite a fly-wheel on this shaft—the turbines themselves are of some size and weight, undoubtedly—and would tend to continue at the increased speed on account of their own momentum and before the pumps could return to their normal condition, the pressure would rise above the normal. And that was this reaction, which in my opinion is not a water-hammer—it is simply a pressure driven up by these pumps to a certain point, that caused the trouble; and it was this sudden reduction of pressure which we noticed when the elevator started up—or this reduction in the pressure in the pipes that would have a tendency to make this pump to clatter—the gears get noisy. I have noticed that on pumps that were geared with gears, that in drawing the water away from them, that even if they could not increase in speed—if the governing device was such that they could not increase in speed—they would clatter anyhow.

"*Q.* Is this relief attachment designed to take care of that falling pressure caused by the withdrawal of the supply?

"*A.* No, sir. As I said, that relief attachment could not supply any additional pressure and it was incapable of supplying water to the system.

"*Q.* It was designed to take care of—

"*A.* Of the shock or water-hammer due to the momentum of the column of water at the elevator when the elevator was suddenly shut off—absorb the inertia—we might say, of the flow of water in that direction."

Speaking again of the pressure relief attachment, Mr. Forslund testified:

"*Q.* You said awhile ago that was for only one purpose and that was to regulate the water-hammer?

"*A.* Yes, sir."

It is entirely clear from the testimony that what defendant was seeking, and what complainant's agent understood she was seeking, was to obtain some device in connection with the elevator which would obviate the objections of the public authorities to the installation of a hydraulic elevator using water directly from the city mains, and that the objections of the city officials and the

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ordinance were founded upon a previous experience, which had resulted in substantially the very thing which resulted from the use of the water by the elevator installed by complainant. The contract must be construed with reference to this situation, and, so construed, we think there can be no doubt of the correctness of the conclusion of the circuit judge that complainant had not complied with its contract. While the elevator worked satisfactorily with the valve open to its full extent, the results at the pumping station and in the city mains were precisely what the city authorities had endeavored to prevent and had been assured would be prevented by the use of a pressure relief attachment. Although, under the contract as between the parties, it was the duty of the defendant to furnish a pressure of 80 pounds to the square inch with the valve open to its full extent, still, complainant's agent fully understood that it was the city that was furnishing the water and applying the pressure.

According to the testimony of the superintendent of the water works, the normal pressure at the pumping station and in the pipes was 125 pounds, and this pressure, at no time while the water was being used at the Arlington by the elevator, fell below 80 pounds; in fact, according to his testimony, the lowest point reached was 95 pounds; and we are satisfied that, construed in the light of the surrounding circumstances and applied to the subject-matter, the contract was complied with so far as the defendant was concerned, and that complainant failed to comply with the guaranty on its part, which was the inducing cause of defendant's entering into the contract.

We think, however, that the decree entered by the court was not authorized under the pleadings in the case. The court decreed that:

"The defendants, having retained the machine, are in equity bound to pay for the same, but are entitled to recoup their damage for breach of warranty against the balance of the purchase price, $1,084.18; being the difference between the actual value of the implement sold

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and what its value would have been had it been up to warranty, to wit, $885, the amount expended by defendants in purchasing and installing air pump, air tank and electric motor to bring the elevator up to the standard of efficiency set up in the agreement, and the board bill of $63 claimed in offset by the defendants; making a total of $948 to be allowed to defendants; that if complainant is dissatisfied with this amount of damages allowed to defendants, it may enter an order referring it to a circuit court commissioner or to the court to assess damages."

While our mechanic's lien law expressly provides that the owner "shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract" (3 Comp. Laws, § 10710), no such issue was presented by the answer. Neither did the defendants ask leave to amend the answer in this regard, nor was any such amendment ordered, as authorized by section 10736, 3 Comp. Laws. Although the defendants have not appealed and their counsel argues in support of the decree, complainant's counsel raise the point in their brief that the decree was not warranted by the pleadings, and their contention we think correct.

The decree, under the pleading and the facts as found, should have been, that the bill of complaint be dismissed, and, as so modified, the decree will be affirmed, unless, within 30 days after the filing of this opinion, complainant's counsel consent that the decree as entered in the circuit court may stand. Costs of both courts to defendants.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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CITY OF GRAND RAPIDS *v.* COIT.

1. MUNICIPAL CORPORATIONS—EMINENT DOMAIN—STREET IMPROVEMENTS.

   Where a city has express power to grade and widen streets and to take private property for public use, it has power to go outside the boundaries of an existing street and take private property for the purpose of widening and otherwise improving it.

2. NEW TRIAL—INADEQUATE DAMAGES—INCREASING AWARD—CONDEMNATION PROCEEDINGS.

   Where the damages awarded in condemnation proceedings are inadequate, the remedy is a new trial, and the court cannot deny the landowner's motion for a new trial on that ground on condition that petitioner will submit to an increased award fixed by the court.

3. EMINENT DOMAIN—NECESSITY OF IMPROVEMENT—QUESTION FOR JURY.

   Where the only purpose of a proposed street improvement, involving the taking of private property, is to make an easier grade, the landowner has a right to the verdict of the jury on the question whether the making of an easier grade, in the manner proposed, is a public necessity, and rulings on instructions which result in a charge which does not give effect to this rule are erroneous.

4. SAME—NECESSITY OF IMPROVEMENT—EVIDENCE.

   In proceedings to condemn land for the purpose of widening a street and making an easier grade, testimony that other streets in the immediate vicinity, which might be improved without taking private property, would accommodate existing and anticipated traffic equally well, is competent on the necessity of the proposed improvement.

5. SAME—EVIDENCE—OPINIONS.

   The opinions of witnesses as to the necessity of a proposed improvement are incompetent.

6. SAME—EVIDENCE—HEARSAY.

   Testimony that certain interested property owners, named, had appeared before the board of public works as protestants and later withdrew their objections and stated that they were perfectly pleased, was incompetent, as hearsay.

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7. SAME—EVIDENCE—NECESSITY OF IMPROVEMENT.

Testimony by the president of the board of public works that the proposed improvement was most patiently and carefully considered before the plan was adopted was incompetent.

Appeal from the superior court of Grand Rapids; Stuart, J. Submitted June 19, 1907. (Docket No. 71.) Decided October 4, 1907.

Proceedings by the city of Grand Rapids against Clara M. Coit and others to condemn land for street purposes. There was judgment confirming the award of the jury, and defendants appeal. Reversed.

Gleason & Lee, for appellants.

Moses Taggart and *R. M. Ferguson*, for appellee.

OSTRANDER, J. Hall street in the city of Grand Rapids runs east and west, is 66 feet wide and about 2½ miles long. It is intersected about one-third of a mile from its west terminus by Grandville avenue, west of which intersection the street has never been graded although for 20 years and more it has been opened and in public use. Some 647 feet west of Grandville avenue, Hall street is intersected by Godfrey avenue. Between Grandville and Godfrey avenues, and running northeasterly from Hall street, are Underhill street and E street, and the first street north of Hall street, connecting Godfrey and Grandville avenues, is Curve street. Grandville avenue is 64.7 feet higher than Godfrey avenue. The common council of the city determined in October, 1904, that the opening and widening of this 647 feet of street was a public necessity, and that it was necessary to take private property for that purpose. It thereupon filed in the superior court of said city its petition under the provisions of Act No. 124, Pub. Acts 1883, as amended by Act No. 48, Pub. Acts 1887, and by Act No. 236, Pub. Acts 1889:

"To acquire the right to take private property for the use and benefit of the public, without the consent of the

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owners thereof for the purpose of opening and maintaining a public street thereon in said city —— feet wide from Grandville avenue to Godfrey avenue together with land for slopes and enbankments as necessary to secure between the limits above named a uniform grade for said Hall street of not to exceed 6½ per cent. for the use and benefit of the public."

It is, and was, proposed to make a road 33 feet in width, not straight, but in the form of the letter S, so as to reduce the grade from a 10 per cent. to a 6½ per cent. grade. Three parcels of land are involved, for each of which the jury, having found,—

"That the opening and widening of Hall street, a public street in the city of Grand Rapids, from the west line of Grandville avenue, a public street in said city, to the east line of Godfrey avenue, a public street in said city, together with land for slopes and embankments as necessary to secure between the limits above named a uniform grade for said Hall street of not to exceed 6½ per cent., is a necessary public improvement, and that it is necessary to take and use the private property described in the petition on file in this cause for the use and benefit of the public for the proposed public improvement in said petition described," awarded the owners compensation.

Appellants did not object to the grading and improvement of the street, and they concede that the plan of improvement proposed involves the taking of their land. They assert it is not necessary to improve the street in the proposed manner; that no public necessity requires the taking of their property. Upon this question, much testimony was introduced. Petitioner having rested, appellants asked that the case be taken from the jury for the reason that it appeared that Hall street had been a public street, 66 feet wide, in actual use, for more than 20 years, and that as matter of law the city had not the power to go outside the street boundaries and take private property for the purpose of the contemplated improvement. The overruling of this motion is the first of the alleged errors presented in the brief for appellants.

For one parcel of land, the compensation awarded was

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$20.85 less than the smallest valuation placed upon it by any witness. A motion for a new trial being made, the court made an order that one be granted unless the city would consent to increase the award $25. This the city did. It is contended that the court had no authority to thus increase the award, and that the motion for a new trial should have been granted without condition.

It is contended, also, that improper testimony was introduced by petitioner, and the charge of the court is criticised.

1. The power of the city to grade and widen streets is express. This, we think, answers the first contention made.

2. The lowest value placed by a witness upon the land known as parcel No. 1 was $335, the highest $1,195.30. The compensation awarded by the jury was $314.15. See *City of Grand Rapids* v. *Perkins*, 78 Mich. 93. This award the petitioner, exercising the option given it by the court, consented to increase to the sum of $339.15. The theory of the attack upon verdicts claimed to be excessive or inadequate is that they are not supported by evidence. The remedy is a new trial. The practice of refusing a new trial if the owner of the verdict will remit the recovery to an amount which the evidence, in the judgment of the trial court, will support, is one of long standing. In cases where the evidence affords a standard or rule for calculating the sum which should be awarded, the practice, whether the verdict is excessive or is inadequate, is open to no objection. Where the award depends upon conflicting testimony, and especially where the allowance to be made rests, of necessity, in the sound judgment of the jury, this asserted and admitted power of the courts is sparingly exercised. In any case, the one in whose favor the verdict is rendered is given the option to remit or submit the issue to another jury. The general rule is that when a trial court determines that the damages, awarded upon conflicting evidence, are inadequate, a new trial will be granted, and that the court cannot render

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judgment for an amount greater than the verdict, nor can a new trial be refused on condition that the defendant pay a sum fixed by the court. 14 Enc. Pl. & Pr. p. 755; *Lorf* v. *City of Detroit*, 145 Mich. 265. In condemnation proceedings, the petitioner is not, as to the compensation to be awarded, a plaintiff. The court was in error in refusing a new trial.

3. It was said by Chief Justice CAMPBELL, in *People* v. *Village of Brighton*, 20 Mich. 57, 71:

"We think there is no doubt that under the constitutional provisions requiring the necessity for using the property, as well as the damages, to be ascertained by the jury, the jury cannot be debarred by the action of the village authorities from determining whether the proposed improvement is required."

See, also, *City of Grand Rapids* v. *Railroad Co.*, 58 Mich. 646; *Commissioners of Parks and Boulevards* v. *Moesta*, 91 Mich. 149; *In re Powers' Appeal*, 29 Mich. 504. In the matter before us, the petitioner is by its action committed to the improvement of this street in a manner which, carried out, must of necessity take the land in question. The purpose and only purpose of the proposed plan is an easier grade. It is a necessary conclusion that the real question to be decided by the jury was whether the making of an easier grade, in the manner proposed, was a public necessity. The court declined to instruct that,—

"If you find that this street may be improved without taking private property, and that there are other streets in the immediate vicinity that may also be improved without taking private property, and that such improvements would together accommodate the general public more fully or equally fully with the improvement proposed, then I instruct you your verdict in this case must be for the defendants."

A request that "whether or not other methods of accomplishing the ends desired may not be adopted without the necessity of taking private property," was also refused and, instead, the jury were told they were—

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"Not to consider the improvements of other streets that might be used in lieu of Hall street between Grandville avenue and Godfrey avenue, but the improvement of Hall street at such point itself. * * *

"You are not to consider improvements that might be made in the future, for all these things are matters of uncertainty, but the conditions that are there now and the necessities that exist and what is proposed to be done, are for you to consider to determine upon the necessity of it for there must be a public necessity for the opening and widening of this street as proposed by the petitioner before the property of any of the respondents can be taken therefor."

The jury were also instructed to—

"Consider the settlement that is in that valley that is to be accommodated in getting out, or what will be there soon, and the points to which the street leads in getting across the city to the eastern part thereof, and what use would be made of the street and what streets are now in that locality, if any, that are in position that they can be used so as to obviate the necessity of this improvement in opening and widening this street, going down the hill."

Taken together, the instructions given do not, in this case, give effect to the rule of *People* v. *Village of Brighton*, supra. Petitioner is a party litigant and it may be assumed that it has the power to improve any of the unimproved streets running from Grandville avenue to Godfrey avenue. Land 66 feet in width is already appropriated for and used as a way. In a sense, a new appropriation of this land, together with adjoining privately owned lands, is attempted, for the purpose of public convenience. Undoubtedly, a grade of 6½ per cent. is preferable to one of 10 per cent. But a 10 per cent. grade does not, for a short distance, prevent the free use of a street. It does not appear that there is any considerable traffic to or from the particular locality of the proposed improvement. If that share of the existing and anticipated traffic required to be accommodated by the use of a way with a lesser grade may be as well or nearly as well convenienced by the improvement of another way, taking

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no private property therefor, and there was testimony tending to support such a conclusion, the jury might have found, if permitted so to do, that the proposed improvement was unnecessary. As has been stated, the vital question was not whether the property sought to be condemned will be useful in carrying out the improvements determined upon by the petitioner, but whether the particular improvement is, itself, a public necessity. We are of opinion that the testimony referred to was calculated to assist the jury in arriving at a proper determination of this question.

For petitioner, over objection, and, later, for respondents, witnesses were permitted to answer questions expressly calling for an opinion concerning the necessity of taking the property for a public street. The president of the board of public works was asked by counsel for petitioner, "Was this matter before your board several times before action on the proposed plant?" and answered, "The matter was most patiently considered, very carefully and deliberately." The same witness stated that certain interested property owners, named, had appeared before the board of public works as protestants and later withdrew their objections and stated they were perfectly pleased. Motions to strike out these statements were denied. Another witness was permitted to testify that three members of the board of public works and the city engineer together examined the street and agreed that the plan proposed was the best one. The opinion evidence referred to was incompetent. *City of Detroit* v. *Brennan & Co.*, 93 Mich. 338; *City of Grand Rapids* v. *Bennett*, 106 Mich. 528; *City of Pontiac* v. *Lull*, 111 Mich. 509. In view of these decisions, the questions calling for opinions should not have been put. The hearsay evidence referred to was incompetent, as was that concerning the patient consideration of the matter by the board of public works.

The verdict is set aside and a venire de novo awarded.

BLAIR, MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

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DETROIT UNITED RAILWAY *v.* BARNES PAPER CO.

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STATUTES—IMPLIED REPEAL—STREET RAILWAYS—EMINENT DOMAIN—ELEVATING TRACKS.

Act No. 133, Pub. Acts 1905, purporting to amend section 6446, 2 Comp. Laws, and conferring the power of eminent domain upon street railroad companies, did not repeal Act No. 101 of the same session, which purported to amend the same compiler's section and contained a proviso limiting the manner in which municipalities could authorize street railroads to cross streets, highways, or other railways, not contained in said Act No. 133; the two acts not being inconsistent, and the later act making no reference to the earlier one.

Certiorari to Oakland; Smith, J. Submitted June 19, 1907. (Docket No. 47.) Decided October 4, 1907.

Condemnation proceedings by the Detroit United Railway against the Barnes Paper Company. There was an order dismissing the petition, and petitioner brings certiorari. Affirmed.

Brennan, Donnelly & Van De Mark and *James H. Lynch*, for petitioner.

Davis & Bromley, for respondent.

MOORE, J. The petitioner is a corporation engaged in the operation of electric railways, both city and suburban. One of its lines runs from the city of Detroit to the city of Flint, passing through the village of Rochester, crossing the Air Line division of the Grand Trunk Railroad in the village on a wooden trestle.

The relator filed its petition in the circuit court for the county of Oakland for the purpose of condemning certain lands of the Barnes Paper Company, a Michigan corporation doing business at the village of Rochester, which company and its attorneys filed certain objections and an an-

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swer to the petition. After a hearing the circuit judge filed written findings on the objections made and dismissed the petition. This is a proceeding to review his action.

The reasons for the ruling of the court may be grouped under six heads:

1. That the failure to publish the ordinance within one week of its passage is jurisdictional and fatal.
2. That the petitioner has no right to construct an embankment on the easterly portion of the highway.
3. That the petitioner is not entitled under the laws of this State to maintain proceedings for the condemnation of land.
4. That the company, having once located its track, cannot change the same.
5. That under the laws of the State of Michigan the village had no authority to grant the right to the company to construct an embankment in the highway, but were limited to authorize the construction of a trestle.
6. That the petitioner does not seek to take all the lands owned by the respondent that would be necessary to take if the improvement is made.

In our view of the case it will not be necessary to consider all these reasons. The record discloses that the first ordinance given by the village of Rochester to build the street railroad through said village, which was passed on January 2, 1899, provided for a grade crossing, across the tracks of the Air Line division; that after this ordinance was passed it was found impossible to build the road across that thousand feet and across the tracks of the Air Line division at grade, because the State railroad crossing board refused to give its consent. This action brought about the passage of another ordinance which may be called the trestle ordinance, and after its passage 1,000 feet of track was laid on a trestle, and is the track upon which the company is now running its cars.

In February, 1906, the village council undertook by ordinance to allow the relator to build an embankment to take the place of the trestle. To make the embankment the relator proposes to use about 30 feet off the east side of Main street and about 90 feet of land, 1,000 feet long,

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belonging to the Barnes Paper Company, lying adjoining and east of the street, and make a fill of earth thereon about 1,000 feet long and from 10 to 30 feet high and lay its railway tracks thereon, which would bring the said tracks somewhat easterly of where they now are, leaving openings in such embankment for the two streets, the Clinton river, and the tracks of the Air Line division, at which place the trestle is now 22 feet high in the clear.

The relator claims the village had the right to authorize it to make the embankment by reason of the provisions of Act No. 133 of the Public Acts of 1905, and that said act repealed Act No. 101 of the same session. Both of these acts purport to amend section 6446, 2 Comp. Laws. Act No. 133 does not, in its title or in the body of the act, refer to Act No. 101, nor does its title mention the subject of eminent domain. Act No. 101 contained the following provisions:

"*And provided further*, That this section shall confer no authority to construct and operate elevated railways so-called, but shall only give to municipalities the right to authorize the construction and operation of street railways above the streets and highways by means of trestles, at points where such construction and operation are deemed to be necessary by reason of such railway crossing highways, streets or other railways. * * * Nothing in this section contained shall be in any way construed so as to in any way affect any rights which abutting property owners may have to damages or additional damages by reason of the erection or maintenance of trestles or other structures above the streets heretofore or hereafter erected or maintained under this section."

Act No. 101 was approved May 10, 1905, and was given immediate effect. Act No. 133 did not contain the proviso limiting the manner in which municipalities could authorize street railways to cross streets, highways, or other railways, but did provide that street railways should have the right and power of eminent domain. This act also took immediate effect.

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It is claimed the act which was passed latest repealed the other. We do not think this necessarily follows. The acts were passed by the same legislature in the same month, and were given immediate effect. One of them confers upon the village councils the right to give roads like the relator certain privileges, but expressly limits their powers in certain ways. In the last act no reference is made to the first act, nor is there any reference made to these limitations. We do not think there is anything so inconsistent in the two acts as to have the effect of repealing the limitations contained in the first act. Having reached this conclusion, we think it unnecessary to discuss the other questions raised.

Judgment is affirmed, with costs to the respondent.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

FLECKINGER *v.* TAFFEE.

1. MALICIOUS PROSECUTION—EVIDENCE—ADMISSIBILITY.
   In an action for malicious prosecution, evidence as to the family of plaintiff is admissible.

2. SAME—EVIDENCE—APPEARANCE OF DEFENDANT.
   It is error to allow a witness to state that defendant appeared to be displeased because plaintiff was allowed to go on his own recognizance, since such testimony goes beyond giving the appearance of the defendant as evidencing a mental state of pleasure, ill will, anger, or the like, which is permissible.

3. SAME—PROBABLE CAUSE—QUESTION OF LAW OR FACT.
   Where the facts are undisputed the question of probable cause is for the court.

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4. SAME—DEFENSES—ADVICE OF COUNSEL.

The advice of counsel, followed in good faith, after a full and fair statement of all the material facts in the case, is a defense to an action for malicious prosecution, though the facts as stated to counsel do not justify the advice given.

Error to Calhoun; North, J. Submitted June 19, 1907. (Docket No. 73.) Decided October 4, 1907.

Case by George C. Fleckinger against Thomas Taffee for malicious prosecution. There was judgment for plaintiff, and defendant brings error. Reversed.

Hatch & Page (*E. J. Dennison*, of counsel), for appellant.

H. W. Cavanagh, for appellee.

BLAIR, J. Defendant caused the arrest of plaintiff for the alleged larceny of a quantity of corn from the farm of defendant, which, at the time of the alleged larceny, was occupied and operated by plaintiff under a written lease containing, among other provisions, the following: Said Fleckinger, party of the second part,—

"To cultivate, work, harvest crops, plant, sow, reap, gather fruit and do each and everything proper and necessary in a good husbandlike manner, and deliver in market all stock, grain and hay, when sold from said farm, under the direction and supervision of the party of the first part, as tenant working the farm of the party of the first part, situated and being in the township of Clarendon, on sections four and five. Said party of the first part to be the directing and controlling mind in the manner in which all work upon said farm shall be performed, and as to the manner of seeding, cultivating and gathering the sale of crops, stock and each and everything pertaining to the management of said farm, said second party taking and being in the position of a servant working and cultivating said farm. * * *

"The said party of the second part agrees to harvest and gather said crops in proper season and to market the same under the direction of the said party of the first part,

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and the proceeds of the same shall be delivered to the said party of the first part upon demand, after deducting the share of the party of the second part. The party of the second part shall be entitled as his compensation for working said farm, one-half of the products of said farm, but it is expressly agreed and understood that all the products grown upon said farm shall first be used to feed and keep in proper condition the stock, hogs, sheep and poultry upon said farm, including six work horses used upon said farm, and two horses and one cow, property of the party of the first part, being in the city of Marshall, and said party of the first part shall have the right to take from the products of said farm sufficient material grown on said farm, to feed, bed and keep said two horses and cow in a proper condition. * * *

"The increase of the stock of said farm shall be divided equally, the products of the said farm shall be divided equally, after feeding as above stated. The fruit grown upon the said farm shall be divided equally. The said second party shall have one-quarter of an acre for a garden of his own. * * *

"The term products of said farm is understood to mean everything produced or grown upon said farm (except garden spot) from a hen's egg to a load of wheat, in fact, everything of every nature and name that is either grown, sown, harvested or raised on said farm.

"It is hereby agreed and understood that the right, title and interest of and to every piece and particle of personal property upon said farm, and the farm itself, is and are absolutely in the party of the first part, who shall have at any time, when the said party of the second part shall fail to perform the conditions of said lease in any manner, the right to take possession of the same and sell the same at public or private sale, and to retain the proceeds of the same as stipulated damages for the nonperformance of this contract. But in case the party of the second part shall well and faithfully perform the conditions of this contract, then the said party of the second part shall be vested with the absolute title to one-half of the products and stock of said farm on the 13th day of March, 1906. The said party of the first part does hereby constitute and make the said party of the second part his agent and attorney in fact, to sell and receipt for products grown and sold from said farm, and the said second party does hereby accept said agency."

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Plaintiff was discharged upon the examination and brought this suit to recover damages for alleged malicious prosecution. Plaintiff took possession of the farm, under the lease, March 14, 1905, and moved off February 20, 1906. On December 21st, defendant notified plaintiff not to move any of the corn off the farm. On December 27th, plaintiff drew 45 bushels of the undivided corn away and sold it, upon advice of counsel but without defendant's knowledge. On December 21st, plaintiff asked defendant to divide the corn, which he refused to do.

"December 21st was our first settlement of the book account. * * *

"I had a settlement with Mr. Taffee after the 21st of December, on the 27th of December, 1905, when we settled right. The first settlement was no good, we didn't settle right. That is the time he brought up two witnesses and I asked him if they were witnesses and he said no, and both boys said they wasn't, but it seems they was. We settled up what he owed me and then deducted what I owed him after what I had credited and balanced the account, and he had $85.71 coming to him and I had a credit of $65.54. I fell in debt to Mr. Taffee $20.17, which I paid February 6th, 1906. I rented another farm that spring, where I am now living. My wife notified Mr. Taffee that I had.

"*Q.* What did you proceed to do in regard to the corn on Mr. Taffee's farm.

"*A.* Well, on the 21st of December, in the first place, I asked Mr. Taffee to divide up all the corn so that I could do with my share what I pleased and he could do with his share what he pleased, and he said that there wasn't a damn ear of corn in that crib belonging to me on the 21st of December. I went and saw you and you advised me to haul my share. * * *

"After that I took three loads of 180 bushels over to the farm; I measured it all up when I put it in, and there was 390 bushels. At that time I had on the farm three head of cows and four head of young cattle; Mr. Taffee had equally as many as I did and we had raised a few more besides. They were to be fed upon the place. My lease was not to be out until the first of March, 1906. I took away the 180 bushels of corn on the 25th of January, 1906. I had no talk with Mr. Taffee about dividing up after De-

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cember 21st, 1905, until after my arrest; then they decided to let the two attorneys divide it up; all the goods.

"*Q.* After the 21st of December, 1905, up to the time of your arrest, you did not ask him to divide up the corn or any of the crops on the place?

"*A.* No. * * * After my arrest and discharge I and Mr. Taffee had a settlement; we divided up the corn that was left there. * * *

"*Q.* Of the corn that you hauled over to the other place, you did not haul your half by 25 bushels; is that right?

"*A.* That is right."

The defendant, Taffee, swore to the criminal complaint January 27, 1906. Before making the complaint, he testified that he consulted with Mr. Dennison, an attorney at law, who drew the lease in question and who had been his attorney for a year before that:

"Before making the complaint I advised with Mr. Dennison at his office; I told him there had been at least one load of corn moved at this time; I also told him the circumstances, as I had learned them that day, about the corn being gone, the forty-five bushels; Mr. Dennison told me that it was larceny and I had a case against the man, but I said that I would proceed to drop that if he would stop there, as I told him that day in the presence of his neighbor who drew the corn away, that he must not or they must not move any more corn from my farm; later when I began to miss corn again I went to Mr. Dennison again. 'This must be stopped,' I said; he said, 'That is the way to stop it, it is larceny, take him with a warrant for larceny.' Mr. Dennison advised me the day that the complaint was made that it was larceny; he said that that was the way to stop it, the proper way, and the only course that I had; that it was larceny and that I must stop it that way; I talked with Mr. Dennison about the corn; I told him again about the forty-five bushels that was sold on the 27th of December, 1905, and after that, the next three or four weeks, I couldn't give the date exactly, I found several loads more gone from the crib; that is, the crib had that appearance, and I went to Mr. Dennison again and that was his advice and I acted on it.

"*Q.* Would you have made that complaint without the advice of Mr. Dennison?

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"*A.* No, sir, I would not, I don't think; I don't pretend to know anything about the law. I paid Mr. Dennison for the counsel I had on that occasion. It is true that I forbade plaintiff taking any corn out of the crib on the 21st of December, 1905; I again forbade him on the 27th day of December, 1905. I had my lease when I had a talk with Mr. Dennison and he gave me advice, and Mr. Dennison looked over the lease; I don't think that I made complaint about anything but the corn, and I told him it looked as though about half of the crib was moved —800 bushels; I told Mr. Dennison of my forbidding plaintiff to take away the corn; on the 21st of December, 1905, I claimed to plaintiff that all the corn in the crib was mine. I had the perfect right and control of it under the expressions in this lease. If his duty was fulfilled, one-half of that corn was his, but at that time it was all mine.

"I don't know whether I have told here all I said to Mr. Dennison but as near as I could remember everything that bears upon the point. I cannot say that I told him something else, I do not remember. I told him that this man was indebted to me nearly $400 or that I was obligated to that amount with him. I don't think that I swore to Mr. Fleckinger, I said that the corn was mine, and that he had no right to move any of it off from the place, and according to our lease he must not do it. I dispute the testimony of plaintiff so far as the language goes. I told Mr. Dennison about Mr. Fleckinger taking away the 45 bushels of corn, some time after the 27th of December, and he advised me then to take this man for it, but I thought it was so small in amount that I would let it go if he did not take any more.

"*Q.* Did you tell him that you balanced accounts that day?

"*A.* No, I didn't tell him anything of the kind. I might have balanced a running account that he was owing me, but the stock, or anything of that kind, wasn't settled, and I didn't tell him it was.

"*Q.* Did you tell him anything about it?

"*A.* I don't remember that I did. I might have, though."

The magistrate testified:

"*Q.* When Mr. Dennison came in there with Mr. Taffee on the first occasion of making the complaint before

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the warrant was issued, you understood that he was counsel for Mr. Taffee, did you not?

"*A.* Why, he told me that he had been over there and looked this all up, and I relied upon it as evidence in the case as to the condition of affairs, partially, at least, with Mr. Taffee in the case.

"*Q.* Didn't you understand that he was representing Mr. Taffee?

"*A.* I thought so at the time, yes.

"*Q.* And didn't he advise Mr. Taffee that he could make the complaint?

"*A.* He told me that it was a valid case in the presence of Mr. Taffee.

"*Q.* On the first occasion?

"*A.* On the first occasion.

"*Q.* And it was on the strength of what he told you, or partially, that you issued the warrant?

"*A.* Yes, partially."

At the close of plaintiff's case, defendant's counsel made the following motion:

"*Mr. Hatch:* At this time we move the court to direct a verdict in favor of the defendant for the following reasons:

"1. For the reason that the act of the plaintiff in this case, Mr. Fleckinger, under his evidence and under the contract or the lease of the farm, was larceny, the act of the taking of the corn and moving it away after he had been directed by Mr. Taffee not to move it, it was, under the evidence in this case, larceny.

"2. That it appears from the evidence, on the part of the plaintiff, that what defendant did in making the complaint, and the consequent arrest of plaintiff in this case, was done under and by reason of the advice of counsel, Edward J. Dennison, an attorney at law, and that that would constitute a perfect defense in the making of the complaint, and a perfect defense in this case.

"3. That there is no evidence of malice in the making of the complaint, and that there was probable cause in the making of the complaint."

The motion was overruled and exception taken. At the close of the case, defendant's counsel renewed the motion with like result. The court submitted the case to the

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jury, who found for plaintiff, assessing his damages at $906.28. Defendant's counsel also made a motion for a new trial, the denial of which and the reasons therefor were excepted to and incorporated in the bill of exceptions for review. Among the points argued in the brief for the defendant are the following:

"The court erred in overruling the objection made by the defendant to the question, 'How much of a family has Mr. Fleckinger,' and in again permitting such testimony against the objection of defendant and in refusing to strike it out.

"The court erred in permitting one of the plaintiff's witnesses to answer the following question, 'State whether or not Mr. Taffee was pleased or not because Mr. Fleckinger was allowed to go on his own recognizance.'

"The court erred in refusing to direct a verdict for defendant upon the evidence of plaintiff, after plaintiff had rested his case."

The court did not err in permitting proof as to the family of plaintiff. *Davis* v. *Seeley*, 51 Am. St. Rep. 357 (91 Iowa, 583); *Smith* v. *Hubbell*, 142 Mich. 637.

We think it was error to permit an answer to the question, "whether or not Mr. Taffee was pleased," etc. The question was asked of a witness who testified to a conversation with Taffee after the adjournment of the criminal case.

"I asked him what they had done and he told me that they held it open until Cavanagh got there. He made some further remark about it, but I am not clear as to what he said. I could not swear positively as to what he said. * * * The substance of it was that he was going up to Mr. Deuel's and see the reason that he let him go.

"*Q.* State whether or not Mr. Taffee was pleased or not because Mr. Fleckinger was allowed to go on his own recognizance?

"*Mr. Hatch:* I object to that as calling for a conclusion.

"*The Court:* I think that is the only way he can convey the idea to the jury.

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"*Mr. Hatch:* Exception.

"*A.* From his appearance I should say that he was not."

This testimony went beyond giving the appearance of the defendant as evidencing a mental state of pleasure, ill will, anger, or the like, which is permissible. *People* v. *Lilly*, 38 Mich. 270; 17 Cyc. pp. 91, 150; *Thurston* v. *Wright*, 77 Mich. 96. The error in the ruling is that it permitted the witness to state his conclusion as to the reason for the appearance, viz., that he appeared to be displeased "because Mr. Fleckinger was allowed to go on his own recognizance."

We are also of the opinion that the court erred in denying defendant's motion for an instructed verdict. Where the facts are undisputed, the question of probable cause is for the court. *Rogers* v. *Olds*, 117 Mich. 370. The material facts were undisputed in this case, were fully and fairly stated to counsel, and the complaint made in reliance on his advice. The material facts were, that plaintiff, against the warning of defendant and without his knowledge or consent, removed the corn and converted it to his own use. Under the provisions of the lease, the plaintiff was clearly guilty of an unlawful conversion of the corn, which would have supported a civil action against which he could have made no defense. If plaintiff took the corn with felonious intent, he was guilty of larceny, otherwise not. There was no dispute as to what plaintiff did; he admitted taking the corn, substantially as stated by defendant, and justified his taking by the advice of counsel. The only dispute in the case is as to the effect of what plaintiff did. His counsel advised him, erroneously, as we think, that he had a right to take the corn. Defendant's counsel advised him, also erroneously, in our opinion, that, as a matter of law, the acts of plaintiff constituted larceny. The settlement of the book account had no bearing upon the question, and it was immaterial whether defendant stated it to his counsel or not. The defendant

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was protected by the advice of counsel, and the motion should have been granted. *Poupard* v. *Dumas*, 105 Mich. 326.

Judgment reversed, and new trial granted.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

WIRTH v. WIRTH.

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150 596

WILLS—IMPLIED REVOCATION—DIVORCE.

A divorce and settlement of their property rights between husband and wife operates ipso facto to revoke his will previously made, and no subsequent act of the testator not accompanied by the solemnities requisite for the making of a valid will will revive it.

Error to Bay; Collins, J. Submitted June 19, 1907. (Docket No. 11.) Decided October 4, 1907.

Bertha Wirth presented for probate the last will and testament of Paul L. Wirth, deceased. The will was disallowed in the probate court, and proponent appealed to the circuit court. There was judgment for contestants on a verdict directed by the court, and proponent brings error. Affirmed.

F. E. Emerick and *James H. Davitt*, for appellant.

John C. Weadock and *Lee E. Joslyn*, for contestants.

MONTGOMERY, J. Paul L. Wirth and proponent, Bertha Wirth, were married in 1876. On April 1, 1892,

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Paul L. Wirth made the will in question. On April 19 of the same year he deposited the will in the office of the probate judge of Bay county, where it remained until his death on November 22, 1905. The testator and his wife, the proponent, continued to live together as husband and wife until November 8, 1897, when they separated. Proponent applied to the circuit court for Bay county, in chancery, for a divorce, and on May 8, 1899, a decree was granted dissolving the marriage between them. Pending the divorce proceedings an adjustment and division of property was made between them in lieu of alimony, dower, etc., the settlement being evidenced by deeds of conveyance and by recital in the decree. The conveyances consisted of one from testator to proponent of certain property, and of a quitclaim deed from her to her husband of the remaining portion of his real estate.

These facts having appeared on the trial, the proponent offered in rebuttal to show the relationship of the parties all through their married life and up to the time of testator's death as bearing upon his intention to revoke the will; that after the divorce the testator seemed to retain his affection and respect for proponent and to realize that he alone was to blame for the separation; that he visited her and wrote her letters; and his declaration both to her and to others in relation to the balance of the property, and a declaration that he desired to have the will in question remain in the probate office and take effect after his death.

This offer of testimony presents the question whether the change in the relations of the parties to the settlement of their property affairs raises a rebuttable presumption of revocation or whether such divorce and settlement operates ipso facto to revoke the will. We think the circuit judge correctly held that the divorce and settlement revoked the will, and that the revocation was made and completed when the decree was signed, and that no subsequent act of the testator not accompanied by the solemnities requisite for the making of a valid will could revive

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the instrument in question and make it a valid will. The statute, 3 Comp. Laws, § 9270, providing the requisites for revocations of a will, contains the following:

"Excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

In the case of *Lansing* v. *Haynes*, 95 Mich. 16, we had before us for consideration the question of whether the law implies a revocation of a will by the subsequent divorce of a husband and wife, the wife being a legatee, and the settlement of their property rights. It was held in that case, upon full consideration, that such subsequent divorce and settlement of property rights did in law imply a revocation of the will. These facts were not treated as facts raising a presumption of revocation open to be rebutted by testimony, for had such been the determination it would have been our duty to remand the case for a new trial, which was not done, but final judgment was entered in this court, the fact of the marriage and separation being treated as a revocation as matter of law. It was said:

"The question is not to be controlled by a possible presumption, but by the reasonable presumption. The possibility, therefore, that the deceased might have desired that the remainder of his property should go to his divorced wife, cannot be considered in determining the question of an implied revocation in this case."

We think the case of *Lansing* v. *Haynes* must be held decisive of the question here presented. The judgment of the court below is affirmed, with costs.

BLAIR, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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KOTCHER *v.* PERRIN.

1. MECHANICS' LIENS — ABANDONMENT OF CONTRACT — COST OF COMPLETION—PRORATING LIENS.

   Where a building contractor abandons his contract after the owner has made payments to him without requiring of him the statement as to liens, etc., and the owner completes the building, and the amounts paid by the owner and disbursed by the contractor to laborers and materialmen is ascertainable, that sum, together with the cost of completing the building and the outstanding liens, divided into the contract price, gives the per cent. of each lienor's claim which he is entitled to recover.

2. SAME—NONPERFORMANCE—WAIVER—LOSS OF RENT.

   The owner is not entitled to recoup for loss of rent where he has waived his right to insist upon the completion of the contract on the date stipulated.

Appeal from Wayne; Donovan, J. Submitted June 19, 1907. (Docket No. 28.) Decided October 4, 1907.

Bill by Charles W. Kotcher against Fred M. Perrin, Elizabeth A. Perrin, John B. Peterson, Jr., the William Monroe Company, the Pittsburgh Plate Glass Company, Sarah A. Nowers, and Ralph P. Peckham to enforce a mechanics' lien. Defendants Monroe Company, Glass Company, and Peckham filed answers in the nature of cross-bills to enforce certain liens. From a decree for complainant and cross-complainants, defendants Perrin appeal. Modified and affirmed.

William C. Stuart, for complainant.

Wesley L. Nutten, for defendants Perrin.

Andrew C. Paterson, for defendant William Monroe Co.

James G. McHenry, for defendant Nowers.

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MONTGOMERY, J. This is a proceeding to foreclose a lien by materialmen. Defendant Peterson agreed to build a house for defendants Perrin complete for $3,750. The contractor failed to complete the house, and the owner after it was abandoned paid $572.17 to complete it. In addition he found liens, including complainant's, $555.05, defendant William Monroe Co.'s, $432.35, Ralph P. Peckham's, $250, and Pittsburgh Plate Glass Co.'s, $48.48, aggregating $1,285.88. It was claimed by defendant that the contract price was almost fully paid before abandonment of the contract by the contractor, but as the payments to the contractor were made without requiring a sworn statement as to liens, etc., from the contractor, and as the court appears to have been of the opinion that the data for prorating the claims of the lien claimants with the amount disbursed in accordance with the rule in *Fairbairn* v. *Moody*, 116 Mich. 61, and *Delray Lumber Co* v. *Keohane*, 132 Mich. 17, were not furnished, a decree was given to complainant and William Monroe Co. for the full amount of their respective liens. The defendants Perrin have appealed.

We have not found it difficult to find from the testimony in the case substantially the amount of money paid by the owners and disbursed by the contractor to the laborers and materialmen. Defendant Perrin gave checks direct for material $1,433.40, not including $200 part proceeds of a check given to the contractor which complainant admits having received for lumber, making a total of $1,633.40. In addition to this other checks were given to materialmen (mainly brick work) amounting to $975. Defendant also gave checks to the contractor amounting to $1,130, but the evidence fails to show that all of this was expended on the job. It is shown, however, that of this sum $938.24 was paid for labor. Peterson testifies that he paid out $3,606, and while this testimony is criticised as hearsay, for the reason that some of the payments were made by the owner, it is obvious that the witness intended by this statement to give the cost to him up to

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the time he abandoned the work. The testimony of Mr. Monroe that the cost of the building would be $5,000 also corroborates the statements of Peterson and Perrin.

The cost of the building was as follows:

Paid for material, etc. (1st list of checks by owner)	$1,633 40
Paid for brick work, etc. (2d list of checks)	975 00
Labor not included in above	938 24
Cost of completion after abandonment	572 17
Liens	1,285 88
	$5,404 69

Of this amount $159 was for extras. The contract cost, including extras, was $3,909. The actual expenditures shown by the testimony, including liens, amount to $5,404.69. If the contract price be prorated among those entitled to share, each must receive .70232 on the dollar. Complainant furnished a total of $1,055.05 worth of material. His prorata share would be $740.95. He has been paid $500, leaving due him $240.95. William Monroe Co.'s full claim amounts to $432.35, and its prorata share amounts to $303.64.

We have examined the testimony cited in support of the claim that complainant is estopped from claiming more than $630 as the amount of his claim, and do not find the claim sustained. Nor do we think the claim for loss of rent is made out. It is evident that defendant waived the right to insist upon the completion of the contract on May 15th.

The decree will be modified in accordance with this opinion. The defendant Perrin will recover of complainant and defendant William Monroe Co. his costs of this court. The decree of the lower court as to costs will stand affirmed.

BLAIR, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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BLACKMORE v. THOMPSON.

CANCELLATION OF INSTRUMENTS — DEEDS — INCOMPETENCY OF GRANTOR.

On a bill to set aside a deed on the ground of incompetency of the grantor, evidence examined, and *held*, to show that the deed was the intelligent act of the grantor.

Appeal from Lapeer; Dodds, J., presiding. Submitted June 20, 1907. (Docket No. 43.) Decided October 4, 1907.

Bill by Ellis Blackmore and others against George E. Thompson to set aside a deed. From a decree dismissing the bill, complainants appeal. Affirmed.

Stickney & Reed, for complainants.

Elmer Shumar and *Geer, Williams & Halpin* for defendant.

OSTRANDER, J. Leonidas Dickerson died after noon and before one o'clock on Monday, July 17, 1905, from injuries received late in the afternoon of the previous Saturday. A horse had kicked a pitchfork, driving the fork handle against his side, producing, probably, a rupture of the liver and other internal injuries. Between nine and ten o'clock, on Monday, he executed a deed of land, running to defendant, an infant. Complainants are decedent's heirs at law. The single question raised by the pleadings is whether this deed was intelligently executed and delivered. The case is not free from difficulty, and if all that decedent did concerning the disposition of his property was to be referred to the point of time when he executed the conveyance a different conclusion might be required. Apart from the effects of the injury he had suffered, the integrity of the mental processes of decedent

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is not disputed. The undisputed evidence is that he learned on Sunday morning from his physician that his injuries were fatal, told the physician that he "wanted some one out there to fix up his property," and named a scrivener of Imlay City, whom the physician undertook to get, and failed because he was not at home. The physician sent no one else because, as he testifies, he did not expect him to collapse so soon. On Monday morning, decedent requested a neighbor to go for a scrivener "to draw some papers," naming the one who drew the deed. This man, a banker and an old acquaintance, with a friend, drove to the farm, witnessed the execution of the deed, and the banker made the notarial certificate. It is therefore clear that after he learned the character and probable consequences of his injury, and at a time when it is agreed he was competent to do so, decedent determined to make some disposition of this land before he died. It is not charged that he was in any manner influenced by others or by another. It is claimed that before the scrivener arrived he was so near death that he could not intelligently make known or conclude what he proposed to do. The testimony concerning his condition during Monday forenoon is, in some respects, sharply conflicting. The attending physician, who came while the deed was being drawn, the nurse, who arrived shortly after and who met the scrivener some half mile from the house on his return to Imlay City, gave testimony tending to prove that decedent was not conscious when the deed was executed. He did not write his name upon the deed but made his mark, although when in health he was able to write. On the other hand, the witnesses to the deed, while admitting the desperate condition of decedent, are positive in their testimony of his intelligence and of the directions which he gave, with which directions the deed corresponds; they assert that he called for a second reading of the description of the land and that he at first talked of also having a life lease of the property made from his grantee to himself. These witnesses are appar-

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ently disinterested. Decedent was a bachelor, 68 years old. He had lived in the family of defendant for 14 years. His farm adjoined the Thompson farm and the two farms had been worked together. He had, before he was injured, expressed the purpose to leave the farm to defendant. A careful analysis of the testimony has convinced me that the conveyance was the intelligent act of Mr. Dickerson. The trial judge, who saw the witnesses, reached the same conclusion and entered a decree dismissing the bill of complaint. The decree is affirmed, with costs to appellee.

BLAIR, MONTGOMERY, HOOKER, and MOORE, JJ., concurred.

MICHIGAN SHOE CO. v. PAUL.

1. EXAMINATION OF WITNESSES—HARMLESS ERROR.
   The exclusion of a question to a witness is harmless where other questions are permitted which substantially cover the same ground.

2. EVIDENCE—CONCLUSIONS—ADMISSIBILITY.
   In an action on the note of a partnership a question to one of the partners whether he had authority from the firm to sign notes and checks was properly excluded, since the answer would have involved a conclusion of fact and law.

3. SAME—CONTRACT—MEMORANDUM—ADMISSIBILITY.
   Where, after testifying to an oral contract, a witness states that the agreement was put in a writing which embodied the whole agreement, but was not signed, the writing may be admitted in evidence as bearing on the truth of the witness' statement.

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4. PARTNERSHIP — INCOMING PARTNERS — LIABILITIES — DEBTS OF OLD FIRM.

Where an incoming partner denies the liability of the firm for the debts of the original owner of the business, a part of which the latter has paid with assets of the firm, it is not error to instruct the jury that the fact that the incoming partner did not deny his liability on being informed that his partner had signed the firm name to the note sued upon is not of itself a ratification or adoption of said note, but may be considered in determining whether he told his partner he might give the note, and that a verdict cannot be found against the incoming partner because he was careless in omitting to know what use his partner was making of the partnership funds.

Error to Lenawee; Lockwood, J. Submitted June 21, 1907. (Docket No. 88.) Decided October 4, 1907.

Assumpsit by the Michigan Shoe Company against Philip A. Paul and John Zimmerman, copartners as Paul & Zimmerman, upon a promissory note and for goods sold and delivered. There was judgment for defendants, and plaintiff brings error. Affirmed.

Bird & Sampson, for appellant.

John A. Riley and *Smith, Baldwin & Alexander*, for appellees.

HOOKER, J. The plaintiff, a wholesale shoe dealer, had a patron named Paul, one of the defendants in this cause, at Blissfield, who became indebted to it in the sum of $500.66, when he entered into copartnership with Zimmerman, the other defendant, and they continued the business as equal partners, Zimmerman having purchased a half interest from Paul. The firm continued to patronize the plaintiff. Plaintiff brought two actions against the defendants in justice's court, one upon a promissory note for $71.13 bearing their signature, the other for the collection of an account for goods furnished them, amounting to $298.80. Judgments were taken, no defense being

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made. The cases were appealed to the circuit where they were consolidated and Zimmerman was permitted to file a plea of the general issue with a notice of set-off and payment, and a sworn denial of the execution of the note. The trial resulted in a verdict of "no cause" and the plaintiff appealed. The testimony showed that Paul's indebtedness was reduced by sundry credits based upon his personal and firm checks, to the sum of $141.13, for which he gave firm notes for $70 and $71.13, respectively. The $70 note was afterwards paid by a firm check, while the latter was made the basis of one of the suits brought. Zimmerman claimed, and appears to have convinced the jury, that he never consented to or knew of the issue of firm checks or notes in payment of Paul's obligation, and that the former were sufficient in amount to pay the firm account.

Errors assigned relate to the rulings on the introduction of testimony and the charge, and will be considered in their order. One Stoepel was called for the plaintiff, and testified that Zimmerman told him that he did not owe plaintiff a cent, and that he did not ask why the plaintiff had not given the firm credit for a check that they had mailed it, which was conceded not to have been credited to the firm. On redirect plaintiff sought to show that this witness "did not know that Paul was using some one's else money to pay his debts with." This was excluded, but he was permitted to state that when he received the checks and notes he nad no knowledge that the person who signed them had no authority to do so, and supposed that he had such authority—which substantially covered the same ground.

The plaintiff called Paul as a witness. He had interposed no defense below, and filed no plea in the circuit, and apparently was willing that firm money should be applied on his personal debts. He was asked by plaintiff's counsel if he had authority from the firm to sign checks and notes. The court excluded an answer, requiring counsel to prove the facts from which the author-

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ity was claimed. There was no error in this, as the answer sought would have involved a conclusion of fact and law. These were then shown, Paul testifying at length as to the copartnership agreement which was admittedly oral. On cross-examination he stated that this agreement was put in a writing which embodied the whole agreement, but was not signed. It was properly admitted as bearing upon the truth of the witness' statement. The witness was asked on cross-examination:

"Is your recollection as to the transaction there, is that as accurate as your recollection is what was in that contract you dictated between you and Zimmerman?"

The witness answered, "I am perfectly positive about this 14th day of March." Plaintiff suffered nothing by this answer.

The substance of the plaintiff's second request was given, which was sufficient. Error is assigned upon the following requests of defendants' counsel which were given:

"9. The mere fact alone that the defendant Zimmerman did not deny his liability, on being informed that Mr. Paul had signed the name of Paul & Zimmerman to the note, is not of itself an adoption or ratification of said note, but you may consider such fact, if you find it to be a fact, in determining the question of whether Zimmerman told Paul he might give the note.

"17. You cannot find a verdict against the defendant Zimmerman because he was careless, if you find that he was, in omitting to know what use Mr. Paul was making of the partnership funds."

We are of the opinion that it was proper to give these requests in connection with the rest of the charge, and in the light of the record.

There is no error, and the judgment is affirmed.

BLAIR, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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IDEAL MANUFACTURING CO. v. LUDWIG.

In re HAMLYN.

INJUNCTION—VIOLATION—CONTEMPT—STRIKES.

Where striking employés of a manufacturing company, against whom an injunction has issued restraining them from interfering with the company's nonunion employés, follow a nonunion employé who is under the escort of a policeman, and address him at a time and under circumstances such that peaceable solicitation is impossible, a claim that their purpose was to peaceably solicit the employé to join the union is a mere colorable pretext to justify their unlawful conduct, and a conviction of contempt is proper. *Ideal Manufacturing Co.* v. *Ludwig*, ante, 133, followed.

Certiorari to Wayne; Brooke and Mandell, JJ. Submitted July 13, 1907. (Docket No. 128.) Decided October 4, 1907.

Bill by the Ideal Manufacturing Company against Martin Ludwig and others to enjoin an interference with complainant's business: On petition, Charles Hamlyn was adjudged guilty of contempt in violating the temporary injunction, and sentenced to imprisonment for 10 days in the county jail. Affirmed.

George F. Monaghan and *Peter J. Monaghan*, for complainant.

Dohany & Dohany, for respondent.

GRANT, J. This case is the companion of *Ideal Manufacturing Co.* v. *Ludwig*, ante, 133. Respondent Hamlyn was a member of the union and was a part of the same hostile crowd which interfered, unlawfully and in contempt of the court's decree, with the nonunion employés of that company. The contempt proceedings of

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both Ludwig and Hamlyn were heard together, and their acts are substantially the same,—the language of each being somewhat different.

The learned circuit judge filed one opinion holding both guilty of contempt. After describing what the defendant did, the court below said:

"Under these conditions the respondent, after following Hardy with the crowd for more than a block, came up close to him and the policeman and addressed Hardy. He claims his purpose was to peaceably solicit Hardy to join the union. As said in the case of Ludwig, peaceable solicitation at that time and under those circumstances was impossible. The claim of the respondent Hamlyn is a mere colorable pretext to justify his unlawful conduct."

The court had jurisdiction, and there was ample evidence to sustain its finding. The case is ruled by the *Ludwig Case*. We find no error upon the record, and the judgment is affirmed.

MCALVAY, C. J., and CARPENTER, HOOKER, and MOORE, JJ., concurred.

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MONTPELIER SAVINGS BANK & TRUST CO. v. QUINN.

MUNICIPAL CORPORATIONS—PUBLIC FUNDS—APPLICATION — JUDGMENT—REGULARITY OF ASSESSMENT.

Where the supervisors in fact spread a tax for the purpose of paying a judgment against a city, and the city treasurer so understood and collected the tax, and kept it separate from the taxes for other city purposes with full knowledge of the purpose for which it was collected and to whom it belonged, it is his duty to pay it over as required by section 8988, 1 Comp. Laws, though the provisions of the statutes were not strictly observed by the assessing officers in spreading the tax.

Mandamus by the Montpelier Savings Bank & Trust Company to compel James Quinn, treasurer of the city of Au Sable, to turn over certain moneys collected for the payment of a judgment. Submitted July 9, 1907. (Calendar No. 21,643.) Writ granted October 4, 1907.

Moore, Brown, Miller & Ladd, for relator.

Charles R. Henry, for respondent.

PER CURIAM. Application for writ of mandamus to compel respondent to turn over certain moneys, alleged to have been collected and to be held by him in his official capacity, for the purpose of paying a judgment, rendered in the circuit court for Iosco county November 7, 1896, in favor of relator and against the city of Au Sable, for $1,119.27 damages, and costs taxed at $43.91.

On October 3, 1902, notice pursuant to section 10482, 3 Comp. Laws, was served upon the supervisors and assessing officers of the city, requiring them to assess the amount due upon the judgment upon the next, 1902, tax rolls and to deliver to the city clerk the statement required by said section.

The tax roll of the first ward, for 1902, contains no reference to city taxes except the usual column, "General

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City Tax." The warrant of the supervisor to the city treasurer, however, itemizes the taxes to be collected, etc., as follows: "Two hundred and sixty-five dollars and fifty-nine cents ($265.59) for city purposes." "Five hundred and fifty-seven dollars and seven cents ($557.07) for judgment against city." The recapitulation states the total of "City tax and judgment" as $824.10.

The second ward tax roll contains no reference to the judgment preceding the warrant, which contains the following, "Eight hundred and fifty-six dollars and ninety cents ($856.90) for judgment against city;" and $408.70 for "city purposes."

In the third ward roll the words "and judgment tax" are added to the words, "general city tax," at the head of column 12, and the warrant directs the collection of "$158.74 for judgment tax."

Issues having been framed and tried before Judge Sharpe, sitting in the Iosco circuit, he made the following findings, to which exceptions were duly taken by respondent's counsel:

"4th. Whether the amount of such judgment, with interest, amounting in all to $1,572.71, was spread upon the tax rolls of the city of Au Sable for the year 1902?

"*A.* Yes. There was nothing in the tax roll, however, to identify it as the judgment in question. The warrant authorized the collection of the amount of the judgment as a 'Judgment against the city.'

"5th. Whether James Quinn, treasurer of the city of Au Sable, collected any of the amounts so spread upon the said tax rolls and, if he did, what amount was collected by him?

"*A.* Yes. Respondent collected upon said tax rolls $991.73 of the amount spread as a judgment against the city.

"6th. Whether the said James Quinn, city treasurer, was ever authorized, directed or required in any manner to collect said judgment or any part thereof, and pay the same to the Montpelier Savings Bank & Trust Co.?

"*A.* He was authorized to and did collect, as stated in answer to issue five. He was not authorized or directed to pay the amount thus collected to relator.

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"7th. What amount, if any, has James Quinn, city treasurer, now in his possession or under his control, collected upon the tax rolls of the city of Au Sable for the year 1902 to apply upon said judgment?

"*A.* $991.73 in his hands on March 30, 1906."

It is clear that the provisions of the statute were not strictly observed by the assessing officers, and, so far as filing the statement with the city clerk is concerned, were not observed at all. But we think it equally clear from the testimony that the supervisors did in fact spread this tax upon the rolls and respondent so understood and collected the tax, at least to the amount found by the circuit judge, and kept it separate from the taxes for other city purposes, with full knowledge of the purpose for which it was collected and to whom it belonged. There was abundant testimony to sustain the findings of the circuit judge, and it is the duty of respondent to pay the money over, according to the requirements of the statute. 1 Comp. Laws, § 3983.

The writ of mandamus will issue as prayed, with costs to relator of the proceedings in the circuit as well as in this court.

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ABATEMENT AND REVIVAL.

The pendency of other suits against a corporation involving the same questions is not ground for quashing an information in the nature of quo warranto brought to test the right of the corporation to exercise its franchises as a corporation, none of the other suits having been brought for that specific purpose. *People, ex rel. Attorney General,* v. *Detroit, etc., R. Co.*, 122.

ACCEPTANCE—See GIFTS.

ACCIDENT INSURANCE—See INSURANCE (5).

ACCOUNTING—See EQUITY (2); EXECUTORS AND ADMINISTRATORS (2).

ACTION—See CARRIERS (4).

ADULTERY—See HUSBAND AND WIFE (3).

ADVERSE POSSESSION.

After plaintiff had cut an artificial channel across his land, between Lake Michigan and Portage Lake, government engineers took possession of the channel and piers for the purpose of making a harbor of refuge, and for a period of over 20 years remained in hostile possession thereof, to the knowledge of plaintiff and his agents, and the government, through both the legislative and executive departments, repudiated his claim for damages repeatedly. *Held*, that he was barred by limitations from maintaining an action of ejectment against the government engineer in possession in behalf of the government. *Heiss* v. *Adams*, 645.

AGENCY—See MORTGAGES (3).

ALIENATION OF AFFECTIONS—See HUSBAND AND WIFE (1).

AMENDMENT—See APPEAL AND ERROR (4).

APPEAL AND ERROR.

1. The fact that an appeal, instead of certiorari, or, after commitment, habeas corpus, is taken to review an order adjudging appellant guilty of contempt in violating an injunction, will not operate to enlarge the field of inquiry in this court beyond what it would be had the review been sought in the proper way. *Enterprise Foundry Co.* v. *Iron Molders' Union of North America*, 31.

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APPEAL AND ERROR—Continued.

2. Act No. 129, Pub. Acts 1905, does not, by reference therein to Circuit Court Rule No. 47, limit the time for making and settling a chancery case for appeal to the time provided by said Rule 47, but the statute expressly grants three months in which to make and file a case, and gives the circuit judge authority to extend the time without cause and without notice to a time not exceeding six months after the entry of the decree. *Nolan* v. *Garrison*, 56.

3. A judgment will not be reversed, whatever the assignments of error, if a correct result has been reached upon undisputed facts and the applicable law. *Van Cleve* v. *Radford*, 106.

4. Where a verdict should have been directed for defendant as requested on the ground of variance, and the declaration could not have been amended so as to set up the cause of action proved, because of the statute of limitations, a judgment for defendant will not be reversed. *Id.*

5. Questions arising on the retaxation of the costs before the circuit judge are no part of the record brought to this court on writ of error to review the judgment, and cannot be considered on such review. *Cox* v. *Klein*, 162.

6. Matters not contained in the bill of exceptions, and matters not presented in the court below, will not be considered by this court on error. *Holmes* v. *Smith*, 327.

7. Act No. 129, Pub. Acts 1905, does not limit the time for settling a chancery case for appeal to the time limited by Circuit Court Rule No. 47. *Tinker* v. *Piper*, 335.

8. Where a defendant in ejectment, after affirmance of a judgment for plaintiff, takes a new trial under the statute, and the evidence on the second trial differs only in respect to a misdescription of the land in one of the deeds, and the question whether the mistake can be shown in an action of ejectment is not raised on the second trial, the decision on the former appeal controls the case. *Nowlen* v. *Hall*, 360.

9. Errors unsupported by assignments of error cannot be reviewed. *Moffet* v. *Sebastian*, 451.

10. In an action by the assignee of a party to an illegal contract to recover back property parted with under the contract, a claim in this court, not made below, that the sale of the property to him was a rescission of the contract, will not be considered. *Benson* v. *Bawden*, 584.

11. Where plaintiff in trover cannot exhibit his case without presenting an illegal contract, as to which the parties are in pari delicto, a judgment for defendant will not be reversed, though the verdict was directed for defendant on the ground that, under the contract, he had title to the property. *Id.*

12. An assignment that the circuit judge erred in entering judgment and in hearing and determining motions to vacate the same when he was disqualified, by relationship with the plaintiffs, to do so, is sufficient in form to raise the question of the disqualification of the judge and the consequent invalidity of the judgment. *Bliss* v. *Caille Brothers Co.*, 601.

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APPEAL AND ERROR—Continued.

18. The disqualification of the judge who entered a judgment, by reason of relationship to the plaintiff, suggested in this court after the return of the writ of error, is an error of fact assignable on the writ of error. *Id.*

14. A bond to stay execution on a judgment pending a writ of error, the condition of which obligates the surety "to pay the said judgment and costs if the same is not reversed" and to "prosecute its writ of error to effect and pay and satisfy such judgment as shall be rendered against it thereon," obligates the surety to satisfy the final judgment rendered on the writ of error, and the obligation is not discharged by a reversal of the judgment which is followed by a rehearing and an affirmance, only the opinion on rehearing being the final judgment. *Culver* v. *Fidelity & Deposit Co. of Maryland*, 630.

15. Service of notice of an application therefor is not essential to give the court jurisdiction to grant a rehearing, since the court could grant a rehearing upon its own motion without application. *Id.* 631.

16. A judgment against a surety on an appeal bond will not be reversed for failure to prove service of an application for a rehearing in the original case, where the records of this court show that such service was had. *Id.*

See ASSAULT AND BATTERY (3); EVIDENCE (7, 9); EXECUTORS AND ADMINISTRATORS (3); MUNICIPAL CORPORATIONS (2–4); NEW TRIAL (4); SAVING QUESTIONS FOR REVIEW; VENDOR AND PURCHASER (1).

APPEAL BONDS—MUNICIPAL CORPORATIONS (1).

ARGUMENTS OF COUNSEL—See CRIMINAL LAW (1); SAVING QUESTIONS FOR REVIEW (2); TRIAL (2–4).

ARREST.

A police officer is not justified in arresting without a warrant a woman quietly walking on the street at a late hour of the night, though she has just emerged from a disreputable saloon, there being nothing to indicate that she is plying a prostitute's vocation, or intends to do so, by solicitation. *Klein* v. *Pollard*, 200.

See FALSE IMPRISONMENT (1, 2).

ARSON.

1. On an information for feloniously burning a dwelling house belonging to respondent with intent to injure a fire-insurance company, evidence examined, and *held*, circumstantially sufficient to sustain a finding that respondent was actually and personally present at the burning or set fire to or burned the building, though there was no direct testimony that he was present or set the fire, and there were witnesses who testified that he was four miles away when the building burned. *People* v. *Mix*, 260.

2 A proof of loss sworn to by respondent describing the house, its

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ARSON—Continued.

contents, and the barn and its contents, was admissible in evidence to show the property burned and its value, as showing a motive for the burning. *Id.*

3. Respondent was entitled, for similar reasons, to show that property not included in the proof of loss was destroyed. *Id.*

4. In an information for burning to injure an insurance company, under section 11544, 3 Comp. Laws, the building burned may be described as a dwelling house, it having been intended to be occupied as a residence, though respondent was not occupying it as such at the time of the burning. *Id.*

ASSAULT AND BATTERY.

1. In an action for an assault and battery, committed while defendants were attempting to retake cattle which had been impounded by plaintiff's husband, defendants were not entitled to show facts from which it could be inferred that the cattle were let into the husband's enclosure, and were therefore not trespassing when impounded, unless such facts were connected with the husband. *Cox* v. *Klein*, 162.

2. An instruction that plaintiff could not recover unless the cattle were trespassing in the husband's field at the time they were impounded, and were not put there by the husband, was sufficiently favorable to defendant. *Id.*

3. Whether the court erred in calling the attention of the jury to the statute that allows the plaintiff in assault and battery no more costs than damages will not be considered where no error is assigned upon the instruction. *Id.*

See CRIMINAL LAW (2); INDICTMENT AND INFORMATION.

ASSIGNMENTS.

The right of action for treble damages for cutting timber, given by section 11204, 3 Comp. Laws, arises from an injury to the estate, and not to the person, of the owner, and would pass to the personal representative of a deceased owner, and is therefore assignable. *Holmes* v. *Loud*, 410.

See CONTRACTS (6); LANDLORD AND TENANT (1–5, 7).

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (12).

ASSUMPSIT—See ELECTION OF REMEDIES.

ATTACHMENT.

1. Where the claimant of property, attached in the possession of plaintiff's debtor, proves title by purchase at a sale in bankruptcy proceedings against the debtor, and proves by a written agreement, the execution of which is not controverted, that the debtor had possession of the property in recognition of that title, he is prima facie entitled to the property, in the absence of evidence that he parted with the title after he acquired it. *Preston* v. *Newcomb*, 512.

2. On the issue of the ownership of property attached in the

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ATTACHMENT—Continued.

hands of plaintiff's debtor, statements of the debtor as to the title to that and other property and as to the validity of the claims of the claimant, not made in the presence of the claimant nor brought to his knowledge, are not competent. *Id.*

See LOGS AND LOGGING; PROCESS.

ATTORNEY AND CLIENT.

It is contrary to the spirit of the code of ethics for a lawyer to draft a will making dispositions of property in his favor, and the court looks upon such dispositions with suspicion. *Abrey* v. *Duffield*, 249.

See RECEIVERS (2).

BAGGAGE—See CARRIERS (1–5).

BANKRUPTCY—See JUDGMENT (3–5).

BANKS AND BANKING.

Where plaintiff's agent accepted a check in payment of an account, and without authority indorsed plaintiff's name upon it, presented it at the bank upon which it was drawn, received the money upon it, and absconded without accounting to plaintiff, and the bank charged the check to the drawer and returned it to him as paid, the bank is not liable to plaintiff for the amount of the check, either on the theory that it received the money from the drawer for plaintiff's use, or that money was paid to the bank for plaintiff's use. *Lonier* v. *State Savings Bank*, 483.

BENEFICIAL ASSOCIATIONS—See INSURANCE (4, 8).

BENEFIT INSURANCE—See INSURANCE (4).

BILL OF REVIEW—See JUDGMENT (6).

BILLS AND NOTES.

1. In an action on a promissory note against several, a notice of special defense, supported by the affidavit of one of the defendants denying the execution of the note, is sufficient to justify the requirement that plaintiff must show the execution of the note before it can be offered in evidence, and to admit the defense of forgery as to some of the signatures. *First Nat. Bank of Durand* v. *Shaw*, 362.

2. Though a part of the names purporting to be signed to a joint and several note are forged it is valid in the hands of a bona fide holder as against those who actually signed it. *Id.*

3. In an action by a maker of a joint note against his co-maker to recover his proportion of the amount paid thereon, plaintiff having made payments at different times, defendant is not injured by the trial court requiring the jury to state in their verdict the several sums allowed plaintiff and their dates and amounts. *Moffet* v. *Sebastian*, 451.

See EVIDENCE (13); PRINCIPAL AND SURETY.

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BILLS OF PARTICULARS—See PLEADING (2).

BONA FIDE HOLDER—See CORPORATIONS (7).

BONDS—See APPEAL AND ERROR (14); MUNICIPAL CORPORATIONS (1).

BOOKS OF ACCOUNT—See EVIDENCE (1).

BOUNDARIES.

1. Fences and monuments of long standing, established not long after a survey and plat were made, are better evidence of true boundary lines than surveys made after the original stakes have disappeared. *Breakey* v. *Woolsey*, 86.

2. An agreement between adjoining landowners establishing a boundary line, acquiesced in by the parties, is binding, although the line established is not the original one. *Id.*

BRIDGES—See DRAINS (2).

BROKERS.

1. In an action by a real estate broker to recover commissions on the sale of land, evidence examined, and *held*, that all prior negotiations regarding the contract of employment were merged in the written agreement between the parties containing an option. *Decker* v. *Klingman*, 96.

2. Where a real estate broker is employed to sell real estate within a certain time, and the time expires without his having made the sale, he is not entitled to his commission, though the sale is ultimately made by the landowner to a person introduced by the broker, there being no fraud or bad faith on the landowner's part to prevent performance on the part of the broker. *Id.*

CANCELLATION OF INSTRUMENTS.

1. On a bill to set aside a deed of land on the grounds of the mental incompetency of the grantor and of the undue influence of the grantees, evidence examined, and *held*, to support a decree for the complainant. *Hopkins* v. *Ormsby*, 598.

2. On a bill to set aside a deed on the ground of incompetency of the grantor, evidence examined, and *held*, to show that the deed was the intelligent act of the grantor. *Blackmore* v. *Thompson*, 693.

See EQUITY (2); WILLS (15).

CARRIERS.

1. In an action against a carrier for the loss of baggage, testimony of its transfer agent that he delivered the baggage at defendant's freight depot is sufficient to prove that the baggage was placed in the custody of defendant. *Wolf* v. *Grand Rapids, etc., Ry.*, 75.

2. That the carrier's agent checked plaintiff's baggage before plaintiff had procured his ticket for passage, in disobedience of instructions, is immaterial on the question of responsibility

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CARRIERS—Continued.

for the baggage, where plaintiff subsequently procured tickets. *Id.*

3. A carrier is liable for the loss of a passenger's baggage properly checked unless lost by the act of God or the public enemy. *Id.*

4. That a passenger bringing an action against a carrier for the loss of his baggage declares in case rather than assumpsit does not affect the liability of defendant, nor require plaintiff to show negligence. *Id.*

5. Where a railroad company and a steamship company advertised a through line between two points, and had a common agent who sold through tickets, and another who checked baggage through, there were circumstances to warrant the inference that they were partners in the business of carrying passengers and baggage between those points, and were therefore jointly liable for the loss of baggage so checked. *Id.*

6. Where a passenger, presenting a ticket requiring him to identify himself as the purchaser upon request, and providing that any claim for damages in consequence of a bona fide mistake of a conductor in rejecting proofs of identity shall be limited to the price paid for the ticket, is wrongfully ejected by a conductor not acting in good faith, he is entitled to substantial damages, and is not limited in his recovery to the price paid for the ticket. *Pierson* v. *Illinois Cent. R. Co.*, 168.

7. In an action against a carrier for wrongful ejection of a passenger presenting a ticket requiring him to identify himself as its purchaser on request, it appeared that plaintiff's physical description in the ticket was incorrect, but the declaration did not count on the misdescription, the action being based upon an unreasonable enforcement of the reasonable regulation requiring identification. *Held*, that instructions that, "If there was any mistake in the description of plaintiff on the ticket, it was a mistake for which defendant was liable," and "Defendant cannot limit its liability for the negligence of itself or its agents by any contract contained in the ticket purchased by plaintiff, upon which he was seeking transportation," condemned defendant for negligence not declared upon and furnished ground for a verdict against it whether the regulation was reasonably enforced or not, and were prejudicial. *Id.*

CERTIORARI.

1. Act No. 310, Pub. Acts 1905, providing for review by certiorari of rulings on motions to quash, intends that the Supreme Court shall have exclusive authority to issue the writ, and the issuance of a writ by a circuit court commissioner is unauthorized. *People* v. *Chamblin*, 653.

2. Though the writ of certiorari in this case is dismissed because issued by a circuit court commissioner without authority, it is regarded as an application to this court for a new writ, and the meritorious question involved therein decided, a

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CERTIORARI—Continued.

speedy determination of the issue being demanded by the interests of both the applicant and the people. *Id.*

3. Whether Act No. 310, Pub. Acts 1905, providing for review by ceritorari of rulings on motions to quash, authorizes a certiorari to review the denial of a motion to dismiss a criminal case upon the ground that the examination does not show reasonable cause to believe that the offense charged in the complaint and warrant was committed, is not decided. *Id.*

See APPEAL AND ERROR (1); HABEAS CORPUS; JUSTICES OF THE PEACE (3).

CHANCERY APPEALS—See APPEAL AND ERROR (2, 7).

CHATTEL MORTGAGES—See FRAUDULENT CONVEYANCES.

CHECKS—See BANKS AND BANKING.

CIRCUIT COURT COMMISSIONERS—See CERTIORARI (1).

CIVIL DAMAGE LAW—See INTOXICATING LIQUORS (3, 7).

COLLATERAL ATTACK—See JUDGMENT (3).

COMMON LAW—See STATUTES (4).

COMPROMISE AND SETTLEMENT.

1. A buyer of standing timber under a contract of conditional sale sold the same to plaintiff for manufacture at mills both in this State and in Wisconsin. The buyer failed to pay for the stumpage and the landowner seized the manufactured lumber in Michigan and presented a claim against the buyer's assignee in Wisconsin which he afterwards compromised. *Held*, that such compromise did not settle a replevin suit brought by plaintiff in Michigan for the lumber seized by the landowner, nor operate to transfer title to the Michigan lumber to plaintiff. *Van Buren* v. *Stubbings*, 206.

2. Plaintiff, claiming that salary was due him as president of defendant and superintendent of its factory, drew checks on defendant's bank account on which he obtained the money but which defendant, through its proper officer, instructed the bank not to charge to its account. Subsequently he sold his stock in the company to defendant for a stipulated sum on which he agreed to accept the amount of the checks as part payment. After full payment for his stock had been made he made a claim for the salary represented by the checks. *Held*, that he was estopped to claim that the matter of his salary was not settled at the time of the sale of his stock. *Hodges* v. *Valley City Desk Co.*, 571.

3. Defendant by written order authorized plaintiff to retain from moneys due him a certain amount as a contribution towards the payment by plaintiff of a certain claim against a railroad upon which both parties had liens. Subsequently plaintiff entered into an agreement with others in interest providing that plaintiff should be fully protected against the claim, and that defendant should be paid in full, and later, before any part of the claim had been paid, consented to the

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COMPROMISE AND SETTLEMENT—Continued.

payment to defendant of the sum due him and the taking of his receipt in full. *Held*, that plaintiff had no cause of action against defendant on the written order, whatever claim he may have had originally being lost by the settlement and receipt. *Friedman* v. *Adams*, 615.

CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN; NEW TRIAL (5).

CONDITIONAL SALE—See SALES (3).

CONSPIRACY.

An instruction that: "A common design or purpose by two or more persons is the essence of the charge of conspiracy, and this common design must be proved either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy you of the existence of such common design, before you can find a conspiracy"—is a correct statement of the law. *Brown* v. *Evans*, 429.

CONSTITUTIONAL LAW.

1. Section 10 of article 18 of the Constitution, providing that the people have a right to instruct their representatives, authorizes a plebiscite, if authority be needed, on the question whether the people desire to nominate their candidates for United States senator by direct vote, but has no bearing on the question how the law submitting such question to the people shall be enacted. *Kelley* v. *Secretary of State*, 343.

2. Section 11633, 3 Comp. Laws, providing that larceny in a railroad car en route may be prosecuted in any county through which the car passes, is invalid as in conflict with section 27, article 6, of the Constitution, guaranteeing trial by jury. *People* v. *Brock*, 464.

See ELECTIONS (1); OFFICERS; STATE LEGISLATURE; STATUTES (2).

CONTEMPT.

1. Willful disobedience of an injunction restraining defendants from interfering with complainant's employés is punishable as a criminal contempt, under 1 Comp. Laws, § 1098, subd. 3. *Enterprise Foundry Co.* v. *Iron Molders' Union of North America*, 31.

2. Proceedings to punish one of the defendants in a chancery suit for violation of an injunction restraining interference with complainant's employés examined, and *held*, that the court had jurisdiction to issue the injunction, and to determine, in the contempt proceeding, whether defendant was guilty of a willful disobedience thereof. *Id.*

3. Chapter 301, 3 Comp. Laws, relates to "Proceedings as for Contempts to Enforce Civil Remedies," and does not apply to contempts in criminal proceedings. *In re Emery*, 383.

4. Section 1098, 1 Comp. Laws, relating to criminal contempts,

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CONTEMPT—Continued.

does not confer upon the circuit court the power to punish for contempt an interference with the people's witnesses on a preliminary examination pending before a justice of the peace, but by its terms excludes such authority. *Id.*

5. A preliminary examination before a magistrate on a criminal charge triable in circuit court is not a cause or matter depending or triable in circuit court such that an interference with the witnesses therein may be punished by the circuit court as a contempt under its general constitutional jurisdiction. *Id.*

See APPEAL AND ERROR (1); INJUNCTION (2).

CONTINUANCE—See NEW TRIAL (4).

CONTRACTS.

1. A contract of employment, entered into for the primary purpose of inducing the employé to break a similar contract with another employer and deprive it, as a competitor, of the benefit of the skill and experience of the employé, is illegal and fraudulent and does not furnish a good consideration for a promise. *Rhoades* v. *Malta Vita Pure Food Co.*, 235.

2. Where plaintiffs declined to accept an agreement drawn on the basis of certain alleged misrepresentations of their agent to defendants and proposed a new one which defendants accepted, and which not only was not based upon or obtained by reason of the fraudulent representations, but was independent of, and in effect repudiated them, such new agreement became the entire agreement between the parties, and testimony as to the alleged fraudulent representations was inadmissible to avoid it. *Simpson* v. *Crane*, 352.

3. Where, on a bill to rescind a contract for the sale of land on the ground of fraudulent representations, it appears that before complainant entered into the contract of purchase he had investigated and learned the falsity of every fraudulent representation alleged in his bill, only an extraordinary case will prevent denial of relief. *Ransier* v. *Dwyer*, 487.

4. A contract by a postmaster of a post office of the third class, by which he agrees to remove the post office to a certain building and maintain it there during his term of office, in consideration of certain office fixtures, is illegal, as against public policy. *Benson* v. *Bawden*, 584.

5. The law will not aid either party to an illegal agreement, but will leave them where it finds them. *Id.*

6. The assignee of a party to an illegal contract cannot recover back property parted with by his assignor under the contract. *Id.*

7. On a bill to enjoin the violation of an oral agreement not to reengage in a certain business, alleged to have been made at the time of selling defendant's business to complainant, and for an accounting for damages, evidence examined, and *held*,

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CONTRACTS—Continued.

that the oral agreement relied upon was not proven. *Bunn* v. *Kernen*, 593.

See APPEAL AND ERROR (11); BROKERS; DRAINS (2); EVIDENCE (8, 14); LANDLORD AND TENANT (6, 7); MECHANICS' LIENS; SALES (4, 5, 7, 10, 11); SUBSCRIPTIONS; VENDOR AND PURCHASER; WILLS (15–17).

CONTRIBUTORY NEGLIGENCE—See MASTER AND SERVANT (1, 7); NEGLIGENCE (1–4); RAILROADS (1).

CORPORATIONS.

1. Authority to the secretary and treasurer of a corporation to contract to pay for services rendered to another, for which defendant corporation was in no way liable, does not authorize the officer to delegate such authority to another. *Rhoades* v. *Malta Vita Pure Food Co.*, 236.

2. A delegation of authority to employ plaintiff for a corporation, and fix his salary, does not authorize making a contract by which the corporation becomes liable to pay him for services previously rendered for the corporation's predecessor in business. *Id.*

3. Where the promoters of a corporation represented that they owned a contract to purchase certain land at the price of $60,000, on which they had paid $20,000, and proposed to transfer it to the corporation for $20,000 in stock, the corporation to pay the remaining $40,000 on the contract, which proposal was accepted, and the corporation organized with a capital of $60,000, $40,000 of which was paid for the land, and $20,000 in stock to the promoters, and the price of the land was in fact $40,000, on which the promoters had paid nothing, they were not entitled to retain their stock, and were accountable to the corporation for money's received from the sale of such stock. *Cuba Colony Co.* v. *Kirby*, 453.

4. That some of their associates doubted the truth of the promoters' statements is immaterial, where they were finally led by the promoters to resolve the doubt in their favor, and act upon the assumption that the false statements were true. *Id.*

5. The maxim requiring a complainant in equity to come with clean hands is not applicable on the ground that after its acquisition of the land complainant corporation issued statements misrepresenting its value, since, with the promoters, who were chiefly responsible for the false statements, out of the corporation, it is not to be presumed that such statements will continue to be issued or that any further harm will come from those already issued. *Id.* 454.

6. Promoters are not entitled to an allowance for promotion expenses where they represented to their associates that there was to be no such allowance. *Id.*

7. Where stock in a corporation fraudulently obtained by a promoter has been transferred to a good faith holder as security for a debt, such holder has a right to retain it as such security subject to the right of the corporation to pay the debt and be subrogated to such holder's rights against the debtor. *Id.*

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CORPORATIONS—Continued.

8. Certain stockholders of a manufacturing corporation having lent it money and being about to indorse its notes at the bank to raise funds for a working capital, the board of directors, all of whom were creditors, authorized the giving of a mortgage upon all the property of the corporation to secure the stockholder creditors and indorsers. The corporation was insolvent within the rule laid down in *Munson* v. *Ellis*, 58 Mich. 331, but the annual report, subsequently made, showed assets of $11,400 and liabilities of $4,800. *Held*, that the mortgage was not invalid as given in anticipation of discontinuing the business or for the purpose of distributing the assets of a non-going concern to preferred creditors. *Webster* v. *Ypsilanti Canning Co.*, 489.

9. A mortgage on the assets of a corporation is not ineffective because ordered by directors who are personally secured thereby. *Id.*

10. Either corporate action formally taken, or the assent of all parties in interest, is essential to make a valid contract for the sale and disposition of real estate. *Taylor* v. *R. D. Scott & Co.*, 525.

See FRAUDS, STATUTE OF (3); PARTNERSHIP (1–8).

COSTS.

Where an excessively prolix brief is filed by appellant, costs on reversal will include only so much thereof as would have been sufficient to amply present his case. *O'Dell* v. *Goff*, 154.

See APPEAL AND ERROR (5); SPECIFIC PERFORMANCE (2).

COURT RULES—See APPEAL AND ERROR (7).

COURTS.

1. Where, subsequent to the filing of a mechanics' lien on certain physical property of a railway company, but prior to the filing of the bill to enforce it, a bill to foreclose a mortgage on the entire poperty of the company was filed in another county, in which the company possessed only franchise rights, the filing of the foreclosure bill gave the court of the latter county exclusive jurisdiction of the entire controversy, including the rights of the lien claimant. *Prather Engineering Co.* v. *Genesee Circuit Judge*, 53.

2. A contract between a legatee, for whom provision for support was made by the will, and the executor, under which the legatee agrees to accept, in lieu of the provision for support, an annual allowance, and such further sum in case of actual necessity as the probate court should allow, is invalid as to the provision respecting application to the court, since the court would not have jurisdiction independent of the contract, and consent cannot confer jurisdiction of the subject-matter. *Hull* v. *Hull*, 500.

See CERTIORARI (2); CONTEMPT (2, 5); ELECTIONS (5).

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COVENANTS—See LANDLORD AND TENANT (7).

CRIMINAL CONVERSATION—See HUSBAND AND WIFE (3, 4).

CRIMINAL LAW.

1. Where it appears that certain of the people's witnesses have been posted as common drunkards, it is prejudicial for the prosecuting attorney to charge inferentially in his closing argument that the posting was done by respondent, there being no testimony to justify such argument. *People* v. *Mix*, 260.

2. Testimony that respondent committed an assault upon a female under the age of 16 years, with intent to have sexual intercourse with her, justifies the examining magistrate in binding him over to the circuit court for trial on a complaint and warrant charging him with assault with intent to commit the crime of rape. (Sections 11489, 11490, 3 Comp. Laws.) *People* v. *Chamblin*, 653.

3. That the testimony taken on an examination on a complaint charging respondent with assault with intent to commit the crime of rape upon a female under the age of 16 years "by force and against her will" fails to show that any force was intended is immaterial, since the information filed may properly omit the unnecessary charge of force, so long as it is based upon the same transaction. *Id.*

See CERTIORARI (3); CONSTITUTIONAL LAW (2); CONTEMPT (3–5).

CUSTOM—See MASTER AND SERVANT (5).

DAMAGES—See ASSIGNMENTS; FALSE IMPRISONMENT (4); INTOXICATING LIQUORS (9); NEW TRIAL (1, 3, 5); SALES (7, 8, 12, 13); TRESPASS.

DEEDS.

On a bill to set aside a deed and for an accounting of the rents and profits of the property described therein, evidence examined, and *held*, that testimony tending to show that the grantor placed the deed, with others to other grantees, in a box in which he kept his papers, and before his death requested defendant to get the box and take care of it, did not tend to show a delivery of the deed to defendant. *Gleason* v. *Stonehouse*, 611.

See CANCELLATION OF INSTRUMENTS.

DIRECTION OF VERDICT—See TRIAL (5).

DISMISSAL AND NONSUIT—See NEW TRIAL (4).

DIVORCE.

1. Refusal of a wife to cohabit with her husband for three years is extreme cruelty warranting a divorce. *Campbell* v. *Campbell*, 147.

2. The action of a wife in repeatedly without cause accusing her

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DIVORCE—Continued.

husband of the offense of adultery is extreme cruelty warranting a divorce. *Id.*

3. Where a husband was given a divorce on the ground of extreme cruelty, and the wife was possessed of property of the value of $1,488, and the husband property of the value of $12,200, a decree allowing her to keep all her property and all the household goods, and requiring him to pay her $5,000, is not unfair to her, there being no children to support. *Id.*

4. That a wife was occasionally under the influence of intoxicants does not constitute habitual drunkenness giving her husband ground for a divorce. *Rapp* v. *Rapp*, 218.

5. On a bill for divorce, evidence examined, and *held*, that the charge against the wife of extreme cruelty was not sustained. *Id.*

6. On a bill by a wife for divorce on the grounds of cruelty and nonsupport, evidence examined, and *held*, insufficient on either ground to support a decree. *Wisner* v. *Wisner*, 319.

See WILLS (18).

DOCUMENTARY EVIDENCE—See HUSBAND AND WIFE (5).

DRAINS.

1. Act No. 612, Local Acts 1905, repealing the general drain law with respect to Ionia county, does not repeal, as to Ionia county, the law governing the construction of drains through several counties. *Whitmore* v. *Ionia Probate Judge*, 192.

2. Where a lawful drain has been regularly laid out and established, the drain constructed, the benefits legally assessed, and the assessments practically all paid, the drain commissioner cannot refuse to draw an order upon the drain fund for the price of bridges and culverts erected as a part of the construction of the drain, on the ground of irregularities in the proceedings of his predecessor in letting the contract for said bridges and culverts. *Joliet Bridge & Iron Co.* v. *Freeman*, 274.

3. Since by the common law and by the statute (section 8787, 3 Comp. Laws) estates of inheritance are freehold estates, and the estate of the vendee in a land contract in possession is an estate of inheritance, such a vendee is a freeholder, and as such entitled to sign an application for a drain under section 4319, 2 Comp. Laws. *Starkweather* v. *Chatfield*, 443.

EJECTMENT—See ADVERSE POSSESSION; APPEAL AND ERROR (8); QUIETING TITLE (4).

ELECTION OF REMEDIES.

The bringing of an action of assumpsit, waiving tort, under section 10421, 3 Comp. Laws, after plaintiff's property has been seized on a writ of replevin, is not an election of remedy barring a subsequent action of trover for the same property, where, at the time of bringing the action of assumpsit, the defendant had not sold the property and therefore had not converted it. *Holmes* v. *Smith*, 327.

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ELECTIONS.

1. Section 10, Act No. 287, Pub. Acts 1907, under which a voter at an election at which voting machines are used is required to call for a paper ballot in case he desires to vote for a combination of candidates which cannot be voted on the machine, requires the voter in such case to disclose his intention not to vote his party ticket, and is therefore unconstitutional as violating the right of the elector to vote a secret ballot. *Helme* v. *Board of Election Com'rs of Lenawee Co.*, 390.

2. Voting machines cannot be used at an election at which the type of machine in use cannot be so arranged as to afford the voter opportunity to vote for any desired combination of the candidates of all parties. *Id.*

3. Act No. 272, Pub. Acts 1907, providing for the election of delegates to the constitutional convention of 1907, makes the provisions of the general election laws applicable so far as the printing of the ballots is concerned, and therefore a candidate is entitled to have his name appear but once on the official ballot, notwithstanding he is nominated by several parties. *Id.*

4. Any type of voting machine may be used, or the type in question in this case may be used, at any election in which the choice between candidates can be expressed by the use of the machine, or by any other method which does not disclose to the inspectors or others the purpose of the voter. *Id.*

5. In the absence of controlling legislation, the composition of a political committee according to the custom and usage of the party, with the sanction of the conventions of the party, will not be disturbed by the courts. *Potter* v. *Deuel*, 398.

6. Section 11466, 3 Comp. Laws, forbidding delegates to political conventions from giving proxies, and requiring vacancies to be filled by the delegation, if applicable to a meeting of a district committee called for the purpose of filling a vacancy on the ticket, is not violated where the committee by majority vote seat a citizen of an otherwise unrepresented county, who presents a proxy from the committeeman from that county. *Id.*

EMINENT DOMAIN.

1. By the term "private way," used in section 6284, 2 Comp. Laws, is meant all private ways, however created, and not merely roads laid out as private roads under statutory provisions; and where a deed conveying land contains also a grant of "right of way for all purposes for which a public alley can be used, over a strip of land" adjoining the land conveyed, a railroad company purchasing the strip with full notice of the prior grantee's rights cannot build a track along the strip without first compensating such grantee. *Detroit Leather Specialty Co.* v. *Michigan Cent. R. Co.*, 588.

2. Where the only purpose of a proposed street improvement, involving the taking of private property, is to make an easier grade, the landowner has a right to the verdict of the jury on the question whether the making of an easier grade, in the

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EMINENT DOMAIN—Continued.

manner proposed, is a public necessity, and rulings on instructions which result in a charge which does not give effect to this rule are erroneous. *City of Grand Rapids* v. *Coit*, 668.

3. In proceedings to condemn land for the purpose of widening a street and making an easier grade, testimony that other streets in the immediate vicinity, which might be improved without taking private property, would accommodate existing and anticipated traffic equally well, is competent on the necessity of the proposed improvement. *Id.*

4. The opinions of witnesses as to the necessity of a proposed improvement are incompetent. *Id.*

5. Testimony that certain interested property owners, named, had appeared before the board of public works as protestants and later withdrew their objections and stated that they were perfectly pleased, was incompetent, as hearsay. *Id.*

6. Testimony by the president of the board of public works that the proposed improvement was most patiently and carefully considered before the plan was adopted was incompetent. *Id.* 669.

See MUNICIPAL CORPORATIONS (14); STATUTES (5).

EQUITY.

1. One who has purchased practically the entire stock in trade of a merchant in bulk, in violation of Act No. 223, Pub. Acts 1905, does not come with clean hands into a court of equity as an intervener to establish his title to the property as against the receiver of the seller. *Farrar* v. *Lonsby Lumber & Coal Co.*, 118.

2. Equity has jurisdiction of a bill by a township treasurer against his predecessor in office for an accounting of the money and funds turned over to complainant and to cancel a receipt for such funds if found to be, through fraud or mistake, for too great a sum. *Beaton* v. *Township of Inland*, 558.

3. Laches which prevents complainant from assailing an order transferring a receivership of a mutual fire-insurance company to another county will also prevent his assailing orders accepting the resignation of the receiver, appointing a new receiver, and approving an assessment upon the policy holders, where, upon the assumption of the regularity of the orders, important proceedings have been taken which cannot otherwise be sustained. *Daniel* v. *Citizens' Mut. Fire Ins. Co. of Jackson*, 626.

See CORPORATIONS (5).

ERROR—See APPEAL AND ERROR (13).

ESTOPPEL.

1. Where a landowner authorized and assented to the removal by village officers of earth from the street in front of his premises, he is estopped to complain of such removal to the extent to which he authorized it. *Wheat* v. *Van Tine*, 314.

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ESTOPPEL—Continued.

2. Where plaintiff in trover contends that she asserted her title to the property in suit when the chattel mortgage upon which it was seized was given by her husband and refused to execute it; that she again asserted her title when the officer attempted to take the property under the mortgage, and did not allow him to take it until it was replevied, the question whether she is estopped to claim the property by her silence is for the jury under proper instructions, her testimony being contradicted. *Holmes* v. *Smith*, 827.

See COMPROMISE AND SETTLEMENT (2); PRINCIPAL AND AGENT (3, 4).

EVIDENCE.

1. The books of a limited partnership association are not admissible to show that defendant paid money on an alleged special obligation to take treasury stock at 50 cents on the dollar, which obligation the defendant denies, and which is not otherwise proved. *Jacobs* v. *Morgenthaler*, 1.

2. Expert engineers may express an opinion as to whether the running of a traction engine past buildings where there was inflammable material, with the damper open, and no spark arrester, was a proper operation of the engine, since it is not a matter necessarily within common knowledge as to how much the issue of sparks would be increased by an open damper. *Underwood* v. *A. W. Stevens Co.*, 39.

3. On a bill by the Roman Catholic bishop of a diocese to enforce specific performance of a declaration of trust in certain real estate, a part of the funds for which were contributed by a voluntary club of the parishioners of the parish, parol evidence that the property was purchased by the trustee and others for the purpose of providing a site for a new church building is competent for the purpose of determining the legal effect of the action of the club. *Eis* v. *Croze*, 62.

4. A witness who states he has shipped railroad ties to a certain market and seen the reports of the inspection sent back from there may state what an inspection according to the rules of that market would show with regard to a certain lot of ties with which he is familiar. *Lehigh* v. *Standard Tie Co.*, 102.

5. In an action for the price of goods sold and delivered, the contract price is some evidence of their value, and is sufficient on that point to support a recovery on the quantum meruit. *Id.*

6. In an action against a carrier for wrongful ejection of plaintiff from defendant's passenger train, a statement by plaintiff, after testifying that as he was sitting in his seat he was seized by the conductor, who proceeded to drag him out, "I was in no position to meet any such assault, for that reason I resisted as long as I could," is not objectionable as a conclusion. *Pierson* v. *Illinois Cent. R. Co.*, 167.

7. The exclusion of proper questions propounded to an expert witness is not prejudicial where the inquiry is pursued in another form of questions and the information secured. *Id.*

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EVIDENCE—Continued.

8. Where it is shown that a witness who testified at a former trial of the case is beyond the jurisdiction of the court, his testimony given at the former trial may be read to the jury. *Dolph* v. *Lake Shore, etc., R. Co.*, 278.

9. Where a letter was traced to the possession of defendant's wife, who has since deceased, and defendant was given notice to produce it and denied having it, and plaintiff claims in this court that defendant was her administrator and as such the proper custodian of her papers, which defendant denies, claiming his son was administrator, and neither party points out any testimony in the record to sustain his claim, it will be presumed the trial court was correct in excluding a copy. *Brown* v. *Evans*, 429.

10. Declarations of a decedent tending to disprove a claim against his estate, not made in presence of the claimant, cannot be shown on the trial of the claim. *Coleman* v. *McGowan's Estate*, 624.

11. Where a claimant against the estate of a decedent for services shows declarations of decedent that there was an understanding that claimant should be paid, a contention that no recovery can be had for services rendered prior to the earliest of the declarations is not tenable, since the declarations constitute an admission of the existence of an obligation to pay claimant's entire claim. *Id.*

12. This court will take judicial notice of its own records in another case. *Culver* v. *Fidelity & Deposit Co. of Maryland*, 681.

13. In an action on the note of a partnership a question to one of the partners whether he had authority from the firm to sign notes and checks was properly excluded, since the answer would have involved a conclusion of fact and law. *Michigan Shoe Co.* v. *Paul*, 695.

14. Where, after testifying to an oral contract, a witness states that the agreement was put in a writing which embodied the whole agreement, but was not signed, the writing may be admitted in evidence as bearing on the truth of the witness' statement. *Id.*

See ATTACHMENT (2); CONTRACTS (2); EMINENT DOMAIN (3–6); EXAMINATION OF WITNESSES; EXECUTORS AND ADMINISTRATORS (3), FALSE IMPRISONMENT (4); GIFTS; HUSBAND AND WIFE (2, 4, 5); INTOXICATING LIQUORS (6, 7); LANDLORD AND TENANT (2); MALICIOUS PROSECUTION (1, 2); MASTER AND SERVANT (12, 14, 15); MUNICIPAL CORPORATIONS (7, 8); PARTNERSHIP (6–8); TRIAL (1); WILLS (2, 6–8, 11, 12).

EXAMINATION OF WITNESSES

The exclusion of a question to a witness is harmless where other questions are permitted which substantially cover the same ground. *Michigan Shoe Co.* v. *Paul*, 695.

EXCEPTIONS—See SAVING QUESTIONS FOR REVIEW (4)

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EXECUTION CREDITORS—See MORTGAGES (7).

EXECUTORS AND ADMINISTRATORS.

1. A postnuptial agreement, by which the wife receives certain property "in full satisfaction of all my dower rights or interests in the lands and property of said H. B. * * * intending to bar myself of all rights and interests in any and all the property of said H. B. to which I might become entitled by reason of being the wife of the said H. B. except the right of support and maintenance out of said property during the lifetime of said H. B.," does not bar her right to the statutory allowance for her support out of the estate during administration. *Bliss* v. *Livingston Probate Judge*, 271.

2. On a bill against executors and a bank to reopen an estate and for an accounting, evidence examined, and *held*, that there is an entire failure to establish the claim that a gift by decedent of money in the bank to his stepdaughter, shortly before he died, was a collusively corrupt attempt to rob the decedent, to which the bank, through its officers, was a party. *Bangs* v. *Browne*, 478.

3. Where there is an entire failure to prove that a transaction with a deceased person was a fraud upon him, as claimed, it is not necessary to determine the admissibility of testimony explaining the transaction offered by defendants and objected to as being matter equally within the knowledge of deceased. *Id.*

See EVIDENCE (10, 11); JUDGES (4); WILLS (15–17).

EXPLOSIVES—See NEGLIGENCE (6).

FALSE IMPRISONMENT.

1. In an action for false imprisonment, the facts amounting to a justification of the arrest must be pleaded, and this is especially true when the arrest was without a warrant. *Tubbs* v. *Haessig*, 185.

2. The burden is upon the defendant in false imprisonment to justify the arrest in accordance with his notice of defense. *Id.*

3. Where there is evidence upon both sides of the question whether plaintiff in false imprisonment committed an assault in the presence of the defendant, an officer, justifying his arrest without a warrant, it is error to direct a verdict for defendant. *Id.*

4. In an action against a policeman for false imprisonment in arresting plaintiff without a warrant on suspicion that she was a prostitute, defendant is entitled to show in mitigation of damages that his superior officers ordered the arrest of all women found on the street at an unusual hour who failed to give a satisfactory account of themselves, though such arrest was unlawful. *Klein* v. *Pollard*, 200.

FELLOW-SERVANTS—See MASTER AND SERVANT (4).

FIRES—See EVIDENCE (2); NEGLIGENCE (3–5); RAILROADS (3–6)

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FORECLOSURE—See MORTGAGES (2).

FORGERY—See BILLS AND NOTES (2).

FRAUD.

A buyer of corporate stock cannot recover of the seller the money paid therefor on the ground of misrepresentations as to the earnings of the corporation where he knew precisely what the representation meant, how the conclusion therein stated was arrived at, and it did not mean, and was not, as to him, a representation that the earnings of the corporation were what he alleges was stated to him. *Van Cleve* v. *Radford*, 106.

See BANKS AND BANKING; CONTRACTS (1–3); CORPORATIONS (3, 4, 7); EXECUTORS AND ADMINISTRATORS (2); PARTNERSHIP (5); VENDOR AND PURCHASER (1).

FRAUDS, STATUTE OF.

1. Any essential part of a contract for the sale of goods of the value of over $50 resting in parol renders it void under the statute of frauds. *McCaskey Register Co.* v. *Truettner*, 241.

2. On delivery to defendant of a telegram addressed to his wife announcing the death of her father, defendant orally authorized the telegraph operator to have the body shipped at his expense. The reply telegram ordering shipment was sent in the name of the wife, and the body shipped to her. *Held*, that defendant's undertaking was a pledging of his own credit on his own behalf, and was not a promise to pay the debt of his wife, and that it was therefore not void under the statute of frauds (section 9515, 3 Comp. Laws) because not in writing. *Hillman* v. *Hulett*, 290.

3. A written proposal to purchase real estate addressed to defendant corporation and to certain individuals as trustees of an estate, such persons constituting the board of directors of the corporation, upon which a majority of the individuals addressed indorsed their acceptance as trustees, there having never been any formal action taken by the board of directors, is not a contract in writing, binding on defendant corporation, and answering the requirements of the statute of frauds, though the trustees, by bill in chancery, to which neither plaintiff nor defendant corporation were made parties, obtained authority to sell as proposed. *Taylor* v. *R. D. Scott & Co.*, 525.

See SPECIFIC PERFORMANCE (4)

FRAUDULENT CONVEYANCES.

1. A sale by a merchant of practically his entire stock in trade in bulk in violation of Act No. 223, Pub. Acts 1905, is void, not only as to creditors, but between the parties, and the bill of sale cannot be given effect as a chattel mortgage on the goods for the purchase money. *Farrar* v. *Lonsby Lumber & Coal Co.*, 118.

2. The giving of a chattel mortgage upon a stock of goods is not a

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FRAUDULENT CONVEYANCES—Continued.

sale, transfer, or assignment in bulk within the meaning of the sales in bulk act, so called (Act No. 223, Pub. Acts 1905), a chattel mortgage being neither a sale nor an assignment in this State. *Hannah & Hogg* v. *Richter Brewing Co.*, 220.

See CORPORATIONS (8).

FREEHOLDERS—See DRAINS (3).

GIFTS.

Acceptance will be presumed in support of the validity of a gift of money in bank, though the donee did not know of it until after the donor died, where the donor wrote a check which was taken to the bank and deposited to the donee's credit, and the amount thereof entered in a pass book kept in the bank, with other customers' books, subject to call by her. *Bangs* v. *Browne*, 478.

See EXECUTORS AND ADMINISTRATORS (2).

HABEAS CORPUS.

On certiorari to review habeas corpus proceedings, brought to obtain the custody of a minor child, the finding of the court below that the welfare of the child will be best subserved by placing it in the care of the mother is a determination of fact conclusive on this court. *Carpenter* v. *Carpenter*, 188.

See APPEAL AND ERROR (1).

HARMLESS ERROR—See APPEAL AND ERROR (3); EVIDENCE (7).

HAWKERS AND PEDDLERS.

1. An ordinance prohibiting hawking and peddling without a license is violated by going without a license from door to door and leaving articles on approval to be returned or paid for at a later date to another servant of the owner. *City of Muskegon* v. *Hanes*, 460.

2. There is no interference with interstate commerce in requiring a license of one who distributes articles of merchandise, shipped here in bulk from another State, to be returned or paid for at a later date to an associate of the distributor. *Id.*

HIGHWAYS AND STREETS—See EMINENT DOMAIN (2, 3); ESTOPPEL (1); MUNICIPAL CORPORATIONS (6, 13, 14).

HUSBAND AND WIFE.

1. In an action by a husband for alienation of his wife's affections by means other than adultery, evidence of facts and circumstances tending to prove adultery is not admissible to show the relations of the parties. *Merrill* v. *Leisenring*, 423.

2. Letters written by plaintiff's wife before the alleged alienation of her affections are admissible for the purpose of showing that on account of plaintiff's conduct she had already ceased to care for him. *Id.*

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HUSBAND AND WIFE—Continued.

3. In an action for criminal conversation, an instruction respecting adultery that: "Mere opportunity to commit adultery is not sufficient to establish this offense; there must be evidence of such facts and circumstances, times and places, and association together as would naturally lead a man of ordinary care and prudence to the conclusion that such parties were having illicit sexual intercourse. It is not necessary to prove sexual intercourse by direct evidence; proof that the parties occupied the same bed during a portion of one night would be sufficient"—correctly states the law. *Brown* v. *Evans*, 429.

4. In an action for alienation of affections and criminal conversation, testimony by witnesses as to statements made by plaintiff's wife to them, detailing acts of extremely cruel conduct on the part of her husband, is inadmissible, being purely hearsay. *Id.*

5. Where suit was begun by capias based on affidavits, one of which stated facts conclusively showing adultery between defendant and plaintiff's wife, and defendant claims that affiant was one of several conspirators who were attempting to blackmail him, and offers a statement purporting to be signed by affiant just before he died, in which he retracted the statements made in the affidavit, plaintiff's request that the statement be submitted to the jury along with the affidavit for comparison of signatures, plaintiff claiming that the statement was a forgery, should be granted. *Id.* 430.

See EXECUTORS AND ADMINISTRATORS (1).

INDICTMENT AND INFORMATION.

An assault and battery is necessarily involved in the crime of taking indecent and improper liberties with a female child under the age of 14 years, as provided in section 11719, 3 Comp. Laws, and a conviction of assault and battery may be had on an information for that offense. *People* v. *Sanford*, 266.

See CRIMINAL LAW (3).

INFANTS—See NEGLIGENCE (2).

INHERITANCE TAX—See TAXATION (4).

INJUNCTION.

1. An injunction restraining the officers and members of a trade union from intimidating the employés of complainant, against whom a strike is in progress, is violated by the president of the union saying to a workman being escorted through a crowd of strikers by an officer, "I see you are still doing your dirty work." *Ideal Manfg. Co.* v. *Ludwig*, 133.

2. Where striking employés of a manufacturing company, against whom an injunction has issued restraining them from interfering with the company's nonunion employés, follow a nonunion employé who is under the escort of a policeman, and address him at a time and under circumstances such that

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INJUNCTION—Continued.

peaceable solicitation is impossible, a claim that their purpose was to peaceably solicit the employé to join the union is a mere colorable pretext to justify their unlawful conduct, and a conviction of contempt is proper. *Ideal Manfg. Co.* v. *Ludwig*, 699.

See CONTEMPT (1).

INSANE PERSONS.

An order of the probate court, entered on March 31st, fixing April 1st, at 4 o'clock in the afternoon, as the time of hearing on a petition for the commitment of an alleged insane person, and requiring service on her of notice of the proceedings at least 24 hours before the time set, and a sworn return of service of the required notice dated March 31st, followed by an order of commitment reciting that due notice as required by law and directed by the court had been made, raises a fair presumption that service was made in time to give the court jurisdiction to make the order of commitment. *In re Schnapka*, 309.

INSOLVENCY—See CORPORATIONS (8).

INSPECTION—See MASTER AND SERVANT (16); SALES (2).

INSTRUCTIONS—See CARRIERS (7); MASTER AND SERVANT (2), 11); NEGLIGENCE (5); SALES (14).

INSURANCE.

1. That a life-insurance policy dated August 1st, and providing for payment of premiums on the 1st day of certain months, was not issued until August 18th, does not postpone the time of payment of the subsequent premiums to the 18th of the several months. *Jewett* v. *Northwestern National Life-Ins. Co.*, 79.

2. Assured, having failed to pay a quarterly life-insurance premium, due August 1st, wrote on October 27th to know how much was due. The company replied on October 31st, stating the amount of the past-due premium with interest, which assured remitted November 4th and the company receipted for November 7th. *Held*, that the action of the company in receiving and retaining the remittance of November 4th was not a waiver of the forfeiture occurring by reason of the nonpayment of the premium due November 1st. *Id.*

3. An application for a life-insurance policy provided that if a premium be settled by note such note should be regarded only as an extension of time of payment and that the company should not be liable for a loss occurring while such note remained due and unpaid. A premium note, past due and unpaid at the time of assured's death, contained the words, "Send to office for collection," the word "office" being written in the blank, and plaintiff claimed that the note not having been sent to assured's office for collection, the company was in default and the policy in force. *Held*, that if the quoted words could be regarded as a part of the note,

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INSURANCE—Continued.

rather than as a mere memorandum for the company's benefit, there was nothing to show that the "office" referred to was the office of assured rather than that of the company, and that the company was not liable. *Burnham* v. *Michigan Mut. Life-Ins. Co.*, 84.

4. On a bill by a fraternal beneficial association to interplead the claimants of the proceeds of a certificate, evidence examined, and *held*, that a foster son of deceased, never legally adopted, who had his own home, separate from that of deceased, was not a member of the family of deceased, and that the designation of him as beneficiary in the certificate was invalid under the rules of the order. *Grand Lodge A. O. U. W.* v. *McKay*, 90.

5. The action of an accident and sick benefit insurance company in writing to the insured in relation to a proposed compromise of his claim that it will hold the matter in abeyance for a few days awaiting a further communication from him, that the proposition made is purely one of compromise, and that the company will in no way waive the conditions of the contract, does not waive a provision of the policy that no action shall be begun thereon after six months from the date on which proofs of loss are required to be filed. *Harris* v. *Phœnix Accident & Sick Benefit Ass'n*, 285.

6. Where an applicant for a life-insurance policy intentionally falsified in giving his answers to questions concerning his health in the past, the facts that both the agent who took the application and the physician who made the examination knew the answers were false, notwithstanding which they wrote the answers as given, do not constitute a waiver, or estop the company from denying the truth of the answers. *Mudge* v. *Supreme Court I. O. F.*, 467.

7. Where a life-insurance policy makes the by-laws of the company a part of the contract, the failure of the company to offer the by-laws in evidence in an action on the policy will not require reversal of a judgment in its favor, the judgment being founded on a breach of promissory warranty sufficiently shown by the physician's examination and the policy. *Id.*

8. Where the laws of a mutual benefit insurance society provide that a member is bound by the decision of the chief officer unless he appeals therefrom to the executive council within 20 days from the date of the decision, and a member is not notified of the rejection of his claim by the chief officer until after more than 20 days have elapsed, notwithstanding the laws also provide that parties interested shall be notified at once whenever a decision is made, the member is not entitled to an appeal, and it cannot be said that he has not exhausted his remedy within the order before bringing suit upon his claim. *Steiner* v. *Supreme Court I. O. F.*, 567.

See PRINCIPAL AND AGENT (3–7).

INTERSTATE COMMERCE—See HAWKERS AND PEDDLERS (2).

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INTOXICATING LIQUORS.

1. Under section 5395, 2 Comp. Laws, requiring that saloons shall be kept closed on Sunday, a saloonkeeper is guilty who enters his saloon on Sunday to fix the fires, empty the pans under the refrigerators, light the lights, and prepare his meals in an adjoining kitchen, though he has no other place in which to prepare his meals, no liquors are ever served in the kitchen, and no person other than himself enters on Sunday. *People* v. *Henze*, 130.

2. A village organized under the general village law (chapter 87, 1 Comp Laws) has no power to establish saloon limits and prohibit the sale of liquors outside such limits. *Timm* v. *Common Council of the Village of Caledonia Station*, 328.

3. In an action under the civil damage law (section 5398, 2 Comp. Laws), against a saloon keeper and his bondsmen, the question whether the saloon keeper received pay for liquor shown to have been furnished in his saloon is immaterial. *Hilliker* v. *Farr*, 444.

4. Where a saloon keeper sold his saloon and gave the buyer a power of attorney authorizing him to conduct the saloon business as the seller's agent, such authority being a mere pretense to enable the buyer to carry on the business unlawfully under the seller's license, the seller's bondsmen are not liable under the civil damage act for unlawful sales made by the buyer. *Id.*

5. Where a person making an unlawful sale of liquor in a saloon was a bona fide agent of the owner of the saloon, and a sale of the business to the agent was a mere pretense to relieve the owner's bondsmen from responsibility, such bondsmen are none the less liable. *Id.* 445.

6. In an action against a saloon keeper and his bondsmen for an unlawful sale made by one to whom it is claimed the saloon was sold and a power of attorney given to facilitate conducting the business under the seller's license, evidence tending to show that the transaction was a bona fide sale and not the creation of an agency is admissible, though it tends to contradict the power of attorney. *Id.*

7. In an action against a saloon keeper and his bondsmen under the civil damage law for an unlawful sale of liquors, it is error to allow proof by plaintiff of other unlawful sales to other persons on the day in question. *Id.*

8. A remark by counsel in argument that "he had been in the practice of law for a good many years and this is the first case he ever knew where counsel for liquor dealers ask the jury to go by the evidence," is improper and prejudicial. *Id.*

9. A mother suing under the civil damage law for the death of her son is not entitled to show that her husband paid the doctor's bills and funeral expenses of decedent occasioned by his injury. *Id.*

See MUNICIPAL CORPORATIONS (10, 11).

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JUDGES.

1. On certiorari to review a judgment of the recorder's court of Detroit, the error relied upon was the denial of a motion that the presiding judge assign the cause for trial before another judge of that court or before one of the circuit judges, on account of his bias, prejudice, and interest. The movant relied entirely upon a newspaper article purporting to be based upon an interview with the judge, but there was no proof that the statements in the article were actually made, and the judge in denying the motion said he was not prejudiced, and nothing occurred at the trial indicative of prejudice. *Held*, that no abuse of discretion was shown. *People* v. *Wolverine Manfg. Co.*, 580.

2. Judgments and orders made by a judge who is disqualified by relationship to a party are not voidable merely, but are void, and subject to collateral attack. *Bliss* v. *Caille Brothers Co.*, 601.

3. A judge is disqualified to hear and determine a case in which a blood relative of his wife within the ninth degree is a party, but he is not disqualified if the relationship arises merely from marriage of the party with the blood relative of his wife. *Id.*

4. Where a suit brought by a testator in his lifetime is continued in the name of his executrix, who is also his widow and a preferred and residuary legatee, she is not merely a nominal party, but is a party in interest, and a judge related to her by affinity within the prohibited degree is disqualified to act, though he was not so disqualified with reference to the testator. *Id.*

5. Sections 276–284, 1 Comp. Laws, providing, among other things, that in Saginaw county "all cases made, motions for new trials and bills of exceptions and settlement of cases for review * * * shall be heard, settled, and certified by the judge before whom the trial or hearing was had" do not require that the judge who entered a judgment must hear and determine a motion to vacate the same where, by reason of a change in parties, he has become disqualified since the entry of the judgment. *Id.* 602.

See APPEAL AND ERROR (12).

JUDGMENT.

1. The question of res judicata cannot be raised by a motion to quash an information filed by the attorney general, but only by a plea in bar. *People, ex rel. Attorney General*, v. *Detroit, etc., R. Co.*, 122.

2. Plaintiff brought attachment against defendant and declared for two payments on a building contract only one of which was shown by the proofs to be due at the time of suing out the writ. Plaintiff then, with leave of the court, withdrew the second installment from consideration of the court and took judgment for the installment due. *Held*, that the judgment did not bar a subsequent action on the second installment. *Love* v. *Flitcraft*, 149.

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JUDGMENT—Continued.

3. The title of a purchaser at a bankruptcy sale is conclusive against collateral attack in any other court or proceedings and cannot be avoided by showing in another court that the purchaser really took title as trustee for the bankrupt and not as a good faith purchaser. *Preston* v. *Newcomb*, 512.

4. A creditor of a bankrupt, who was a party to the bankruptcy proceedings, and recognized the validity thereof and the discharge of his claim, and accepted a note to revive his claim after the sale in bankruptcy was held, cannot question the title of a purchaser at the sale. *Id.*

5. A creditor who becomes such after the conclusion of bankruptcy proceedings against his debtor cannot question the validity of the sale in bankruptcy nor the title of a purchaser at such sale. *Id.*

6. The denial on the ground of laches of a mandamus to set aside an order transferring receivership proceedings to another county, on the ground of irregularities, is conclusive of the petitioner's right to question the same irregularities by filing a bill of review. *Daniel* v. *Citizens' Mut. Fire-Ins. Co. of Jackson*, 626.

See JUDGES (2); MUNICIPAL CORPORATIONS (15).

JUDICIAL NOTICE—See EVIDENCE (12).

JURISDICTION—See CONTEMPT (2, 5); COURTS; EQUITY (2); JUSTICES OF THE PEACE (1).

JURY.

1. A person in the employ of one of the parties is incompetent to sit as a juror. *Pearce* v. *Quincy Mining Co.*, 112.

2. Where there is no claim that an impartial jury was not secured, a judgment will not be reversed because the court overruled a challenge to an incompetent juror, though the party objecting challenged him peremptorily, and used all his peremptory challenges. *Id.*

See CONSTITUTIONAL LAW (2).

JUSTICES OF THE PEACE.

1. Where the want of jurisdiction of a justice of the peace, because of nonresidence of the parties, is not apparent on the face of the record, a plea to the jurisdiction, properly verified, or a motion to quash, likewise verified, is the proper manner in which to raise the question, and not by an unsupported motion to dismiss. *Appleman* v. *Hahn*, 245.

2. A motion to dismiss a suit in justice's court because of the nonresidence of the parties, nonresidence not appearing on the face of the record, and the motion not being supported by any proof, is properly denied. *Id.*

3. On certiorari to review a judgment of a justice of the peace, plaintiff cannot retry questions of fact on new affidavits and proofs in the circuit court; the office of the writ being to review questions of law. *Id.*

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JUSTICES OF THE PEACE—Continued.

4. Act No. 187, Pub. Acts 1903, makes the practice in justice's court conform to that prescribed for circuit courts by Circuit Court Rule No. 27c, and authorizes the plaintiff, on appeal from justice's court, to discontinue as to one or more joint defendants and take judgment against those remaining. *Hillman* v. *Hulett*, 289.

LACHES—See EQUITY (8); MORTGAGES (6).

LANDLORD AND TENANT.

1. Where a lessee, by agreement separate from the lease, has a right to have made certain repairs and improvements, such right may pass by parol to an assignee of the lease, provided such be the intent of the parties to the assignment. *Keeley Institute Company of West Michigan* v. *Shaw*, 519.

2. In an action by the assignee of a lease against the lessor for damages for failure to repair as agreed with the lessee by an agreement separate from the lease, the transaction between the lessee and the assignee is competent to show whether the rights to have repairs made were included, and it is immaterial whether the lessor was present, or a party to that bargain, she having consented to the transfer of the lease. *Id.*

3. Where an agreement of a lessor to repair and improve has been performed and performance accepted by the lessee, there is no further claim and no right to repairs passes to an assignee of the lease. *Id.*

4. Where a lessee of premises had a right by agreement separate from the lease to have performed certain repairs and improvements, and plaintiff acquired those rights by parol at the time of taking an assignment of the lease, a declaration alleging that plaintiff acquired such right by the assignment of the lease should not be so strictly construed as to exclude proof of the parol transfer. *Id.*

5. Where a lessee has, by an agreement separate from the lease, a right to have made certain repairs and improvements, such right does not pass by an ordinary assignment of the lease, but may pass by agreement, and an instruction that all the rights of the lessee passed by the assignment whether such was the intention of the parties or not, is erroneous. *Id.*

6. A contract by a landlord to make certain repairs and improvements upon the leased premises does not merge in the lease subsequently executed, where the lease does not contain the substance of the contract for repairs, nor refer to it in any way. *Id.*

7. Though an agreement to repair not contained in the lease is a separate collateral agreement, which does not run with the land, the whole transaction between the lessee and his assignee may be considered on the question of the transfer of the right to repairs, under the rule that where several instruments are made between the same parties at the same time they form one entire contract and are to be construed together as one transaction. *Id.* 520.

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LARCENY—See CONSTITUTIONAL LAW (2).

LIENS—See LOGS AND LOGGING.

LIFE INSURANCE—See INSURANCE (1-4, 6, 7); PRINCIPAL AND AGENT (3-6).

LIMITATIONS—See ADVERSE POSSESSION; APPEAL AND ERROR (4).

LIMITED PARTNERSHIP—See EVIDENCE (1); PARTNERSHIP (1-8).

LOGS AND LOGGING.

In attachment proceedings under the log lien law, a return by the officer serving the writ that the owners are nonresidents, and that within the life of the writ he has served a resident agent of the owners, is good, since it follows the statute (section 10761, 8 Comp. Laws). *Pepin* v. *Nault*, 180.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, evidence as to the family of plaintiff is admissible. *Fleckinger* v. *Taffee*, 678.

2. It is error to allow a witness to state that defendant appeared to be displeased because plaintiff was allowed to go on his own recognizance, since such testimony goes beyond giving the appearance of the defendant as evidencing a mental state of pleasure, ill will, anger, or the like, which is permissible. *Id.*

3. Where the facts are undisputed the question of probable cause is for the court. *Id.*

4. The advice of counsel, followed in good faith, after a full and fair statement of all the material facts in the case, is a defense to an action for malicious prosecution, though the facts as stated to counsel do not justify the advice given. *Id.* 679.

MALPRACTICE—See PHYSICIANS AND SURGEONS.

MANDAMUS—See JUDGMENT (6).

MASTER AND SERVANT.

1. Though plaintiff, suing for a personal injury, was employed in violation of the statute (Act No. 113, Pub. Acts 1901, § 3), which recognizes the immaturity of judgment of children under 16, he cannot recover for an injury received in consequence of his thrusting his hand into a planer head on the mistaken supposition that it was not running, knowing at the time all that the most experienced person could have told him about the danger of so doing. *Beghold* v. *Auto Body Co.*, 14.

2. Evidence that plaintiff's brother stated that plaintiff was 16 does not entitle defendant to an instruction relieving it from liability based on violation of the statute, if the foreman who employed him believed, and had good reason to believe, he was 16, where there is no evidence that plaintiff was asked his age, or that he knew of the representations said to have been made by his brother. *Id.*

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MASTER AND SERVANT—Continued.

3. A pumpman employed in a mine long enough to raise a presumption of acquaintance with the system under which it was worked will be deemed to have assumed the risk of having the duties of watchman performed by the shift boss. *Williams* v. *Verona Mining Co.*, 45.

4. Recovery against a mine owner for the death of a pumpman in the mine cannot be based on the negligence of a brakeman having control of the hoisting machinery, they being fellow-servants. *Id.*

5. In an action against a mine owner for the death of a servant, a pumpman, evidence examined, and *held*, that there was none to show a custom of defendant of leaving its engine house and hoisting machinery without any one in charge during the hour between shifts, while pumpmen were in the mine, nor to show that the employment of a particular brakeman was such as to leave him to infer the right to leave his post of duty at such times. *Id.*

6. In an action against a mine owner for the death of a minor servant caused by a fall of rock in the mine, instructions as to negligence, contributory negligence, duty to warn, and deceased's knowledge of the danger, examined, and *held*, correct and applicable to the case. *Pearce* v. *Quincy Mining Co.*, 112.

7. In an action against a master by a servant for personal injuries resulting from getting caught in the knives of a jointer, evidence examined, and *held*, that plaintiff's carelessness in attempting to clean the accumulated chips and dust from the defective suction pipe of the machine without stopping it contributed to his injury, and that a verdict should have been directed for defendant. *Mulholland* v. *Ideal Manfg. Co.*, 126.

8. A railroad company is liable for an injury to the servant of a lumber company caused by the negligence of train operatives while switching cars in the lumber company's yard, the lumber company having no control over the train operatives further than to inform them what switching was to be done. *Fitzpatrick* v. *Michigan Cent. R. Co.*, 194.

9. There is no violation of the statutory duty on the part of an employer in failing to guard a revolving line shaft situated two feet from the floor of a factory at a point where there are no couplings, set screws, or projections of any kind. *Hertel* v. *Safety Folding Bed Co.*, 223.

10. In an action by a servant for personal injuries caused by being caught on a revolving shaft, evidence examined, and *held*, that sawing crating material was within the scope of employment of an employé of the shipping department of a factory, and that the risk of being caught on the shaft from which the saw was driven was apparent and was assumed by him. *Id.*

11. Where, in an action by a servant against an electric railway company for injuries caused by being struck by a car operated by an incompetent motorman, the only ground upon which recovery could be based was the negligence of defend-

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MASTER AND SERVANT—Continued.

ant in retaining the incompetent servant in its employ with knowledge of his incompetence, it was error to instruct that the jury might fully consider the other claims of negligence in determining whether defendant retained in its employ an incompetent motorman whose negligence caused the injury. *Trend* v. *Detroit United Ry.*, 338.

12. Books kept by defendant showing the records of conductors and motormen, and containing entries as to the alleged incompetent motorman, are admissible in evidence as to his record, not only for the purpose of showing notice to the company of his record, but also as prima facie evidence of any facts stated therein, and plaintiff is not limited in his use of the books to specific acts of incompetency otherwise shown, except as he may have limited himself by his declaration. *Id.* 339.

13. Whether a servant suing his master for a personal injury caused by the negligence of an incompetent fellow-servant is estopped to rely on the negligence of the master in retaining such servant in his employ by the fact that such retention was due to the demands of a union of which plaintiff was a member, will not be decided on a record which does not show the agreement between the defendant and the union. *Id.*

14. In an action for the death of a servant caused by inhaling ammonia gas blown out of a pipe joint claimed to have been packed with an improper gasket, evidence that other gaskets of the same material, placed at the same time, and subject to the same influences, had been removed because of deterioration, is admissible as showing a duty to inspect. *Kaess* v. *Tivoli Brewing Co.*, 371.

15. It appearing that oil had a softening effect upon the gaskets, testimony tending to show the presence of oil in the pipes, and the impossibility of entirely avoiding it, is admissible. *Id.*

16. In an action for the death of a servant caused by inhaling ammonia gas blown out of a pipe joint claimed to have been packed with an improper gasket, evidence and rulings on evidence examined, and *held*, that it could not be said, as a matter of law, that, with evidence which the plaintiff might have produced except for erroneous rulings, the cause of the accident would appear to be entirely conjectural, or that the case presented would be one devoid of evidence that a previous inspection would have been of value. *Id.*

17. Plaintiff, a common laborer, was directed by his master to assist in holding up and bolting to place an iron plate forming a part of the spout of a bucket conveyor in a beet sugar mill, and while that duty was being performed one corner of the plate got inside the spout, caught on a descending bucket, and injured plaintiff. *Held*, that whether plaintiff's employment as a common laborer comprehended that duty was immaterial, the danger being so apparent as to call for no warning. *White* v. *Owosso Sugar Co.*, 478.

18. Negligence of the master in not providing sufficient help to

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MASTER AND SERVANT—Continued.

handle a heavy article is not available to a servant injured while handling it while other employés of the master stood by and could have aided had it been thought necessary. *Id.* 474.

19. A servant employed at common labor cannot recover of his master for an injury received while handling a heavy article, the danger being obvious, and the master having no knowledge of the danger that the servant did not possess. *Id.*

MECHANICS' LIENS.

1. On a bill to enforce a mechanics' lien for furnishing and installing a hydraulic elevator in defendant's hotel, evidence examined, and *held*, to show that defendant performed her contract to furnish a water pressure of 80 pounds per inch, and to show that complainant did not perform its guaranty to furnish a pressure relief attachment such that the pressure in the city water mains would not vary to exceed five pounds per square inch when the elevator was stopped, which was the inducing cause of defendant's entering into the contract. *J. W. Reedy Elevator Manfg. Co.* v. *Peck*, 657.

2. Though the mechanics' lien law expressly provides that the owner "shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract" (section 10710, 3 Comp. Laws), a decree awarding complainant a lien for the contract price less defendant's damages is not warranted by the pleadings where no such issue is presented by the answer, and no amendment was asked or ordered as authorized by section 10736, 3 Comp. Laws; and it appearing from the proofs that complainant failed in performing its contract, the bill should be dismissed. *Id.*

3. Where a building contractor abandons his contract after the owner has made payments to him without requiring of him the statement as to liens, etc., and the owner completes the building, and the amounts paid by the owner and disbursed by the contractor to laborers and materialmen is ascertainable, that sum, together with the cost of completing the building and the outstanding liens, divided into the contract price, gives the per cent. of each lienor's claim which he is entitled to recover. *Kotcher* v. *Perrin*, 690.

4. The owner is not entitled to recoup for loss of rent where he has waived his right to insist upon the completion of the contract on the date stipulated. *Id.*

See COURTS (1).

MERGER—See LANDLORD AND TENANT (6).

MINES—See MASTER AND SERVANT (3–6).

MISREPRESENTATIONS—See CONTRACTS (2).

MONEY PAID—See BANKS AND BANKING.

MONEY RECEIVED—See BANKS AND BANKING.

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MORTGAGES.

1. After complainant had discharged a mortgage on certain land by reason of a misunderstanding of the direction of a subsequent grantee of the land, the land was conveyed to defendant by a clear warranty deed, defendant giving a purchase money mortgage. Defendant and his grantor afterwards procured through complainant on a new mortgage money to pay the purchase money mortgage, complainant at the time procuring an abstract and assuring them that the title was clear. *Held*, that complainant was not entitled to foreclose the mortgage discharged through mistake, defendant never having assumed it or known of it. *Messmore* v. *Maerz*, 331.

2. Where the president of a bank, which had foreclosed a mortgage on complainant's property for more than the amount legally due, agreed that if complainant would remit $100 to him before the period of redemption expired he would redeem the property for the amount legally due and sell it to complainant on contract, and complainant sent the $100 as agreed, which the president used with his own funds in purchasing the property, he could not, by refusing to furnish complainant information as to how much was actually due upon the mortgage, defeat her of her right to redeem, nor by paying more than was legally due the bank compel her to pay him a like sum. *Cusick* v. *Spencer*, 434.

3. A claim that complainant's husband, who attended to the business for her, knew the facts as well as the president of the bank, and that therefore complainant was bound to pay him the amount he paid the bank, is not well taken where, though complainant's husband knew that payments had been made upon the mortgage and the amount of them, he was not apprised of the computation and just what made up the total amount for which the place was sold. *Id.*

4. Recognition by defendant president of complainant's ownership of the property, and his advising with her about repairs, is a circumstance supporting her right to redeem. *Id.*

5. An unsuccessful demand of the $100 after failure to agree as to the amount legally due upon the mortgage does not operate to defeat complainant of her right to redeem. *Id.*

6. A delay of seven years is not such laches as will defeat complainant's right to redeem, where neither of the defendants treated complainant frankly and openly, but withheld from her the true facts in regard to the payments made upon her mortgage, and, knowing of complainant's claims, acted in open hostility and defiance thereof and have been in no respect misled. *Id.*

7. A corporation gave a mortgage covering its real and personal property to a trustee to secure certain creditors, and thereafter an unsecured execution creditor levied on the real estate. Subsequently the trustee foreclosed the mortgage as to the real estate and bid it in for a sum sufficient to pay the entire debt, and later during the period of redemption foreclosed the mortgage as to the personal property, bid for it a

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MORTGAGES—Continued.

sum sufficient to pay the entire debt, took the property and disposed of it. *Held*, that the execution creditor is entitled to a lien upon the real estate superior and prior to the title asserted by the trustee, and in default of payment of his debt, to the right to sell the real estate to satisfy the same. *Webster* v. *Ypsilanti Canning Co.*, 489.

See CORPORATIONS (8, 9); COURTS (1).

MUNICIPAL CORPORATIONS.

1. The signing of a claim of appeal and an appeal bond in a suit in which a city is interested are ministerial acts which are properly delegated by the council of the city to the mayor. *City of Flint* v. *Stockdale's Estate*, 214.

2. A resolution of the council of a city directing the mayor and clerk to enter into a contract with a named attorney employing him to take charge of certain litigation in conjunction with its committee is a sufficient delegation of power to the mayor and the attorney to authorize them to take an appeal in the litigation referred to. *Id.*

3. The mayor of a city is the proper party to sign a claim of appeal from probate court on behalf of the city. *Id.*

4. The act of the common council of a city in ratifying the act of the mayor in taking an appeal and signing an appeal bond on behalf of the city, if not necessary, is within its power and disposes of any objection that may be raised as to the authority of the mayor. *Id.*

5. Under the charter and ordinances of Bay City, a police officer is not entitled to compensation during the time he is suspended and renders no "active service." *Hawkins* v. *Bay City*, 268.

6. Where no street grade has been legally established in a village, a landowner cannot recover damages from the village for removal of earth from the street in front of his property for the improvement of the street. *Wheat* v. *Van Tine*, 314.

7. Though parol evidence is not admissible to contradict the record of the proceedings of the common council of a village, it is admissible to show facts omitted from such record, since the failure of the clerk to properly enter such proceedings cannot affect the rights of individuals who have acted upon the faith of the action of the council, in fact duly taken, but not recorded. *Id.*

8. Parol evidence is admissible to show that certain bills, audited and approved by a village council with full knowledge of their contents, included the expense of a certain street improvement for the making of which no record authority appears, since what the council could authorize it could ratify, and the allowance of the bills was a sufficient ratification. *Id.*

9. In an action against village officers for unauthorized removal of earth from the street in front of plaintiff's property, evidence examined, and *held*, to conclusively establish that defendants' acts were ratified by the council of the village,

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MUNICIPAL CORPORATIONS—Continued.

and that a verdict for defendants might properly have been directed on that ground. *Id.*

10. Where the power to regulate and prescribe the location of saloons is expressly given to a municipality, an ordinance fixing a saloon district is a valid exercise of the power. *Timm* v. *Common Council of the Village of Caledonia Station*, 823.

11. Charter power to a municipality to "suppress" saloons does not authorize an ordinance establishing saloon limits. *Id.*

12. A grave doubt as to the power of a municipality to pass an ordinance should be resolved against the existence of the power and the ordinance declared invalid. *Id.*

13. In this case, involving the power of the city of Port Huron to levy a special assessment upon city lots to pay for sprinkling the street upon which they abut, the power is denied; Mr. Justice HOOKER, with whom concur Chief Justice MCALVAY and Justices GRANT and OSTRANDER, denying the power on the ground that the sprinkling is of no substantial or permanent benefit to the property, and Mr. Justice CARPENTER denying it on the ground that the charter of the city does not authorize a special assessment for sprinkling by the front foot rule without any hearing as to benefits. *Stevens* v. *City of Port Huron*, 536.

14. Where a city has express power to grade and widen streets and to take private property for public use, it has power to go outside the boundaries of an existing street and take private property for the purpose of widening and otherwise improving it. *City of Grand Rapids* v. *Coit*, 668.

15. Where the supervisors in fact spread a tax for the purpose of paying a judgment against a city, and the city treasurer so understood and collected the tax, and kept it separate from the taxes for other city purposes with full knowledge of the purpose for which it was collected and to whom it belonged, it is his duty to pay it over as required by section 3983, 1 Comp. Laws, though the provisions of the statutes were not strictly observed by the assessing officers in spreading the tax. *Montpelier Sav. Bank & Trust Co.* v. *Quinn*, 701.

See ESTOPPEL (1); INTOXICATING LIQUORS (2); SUBSCRIPTIONS (2).

MUTUAL BENEFIT INSURANCE—See INSURANCE (8).

NEGLIGENCE.

1. The rule that a plaintiff cannot recover damages if his injury could have been avoided by the exercise of ordinary care on his part obtains in cases where the negligence of defendant is negligence in law, arising from violation of a statute. *Beghold* v. *Auto Body Co.*, 14.

2. Though the care required of infants is measured in some degree by age, experience, and intelligence, they may, as a matter of law, be guilty of negligence, if not too immature to understand the danger and the necessity of acting carefully. *Id.*

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NEGLIGENCE—Continued.

3. In an action for the loss of a storehouse destroyed by fire as the result of the negligent operation of a traction engine while being removed from plaintiff's premises by defendant, evidence examined, and *held*, that it was open to the jury to find that plaintiff, on being told that all that was wanted was a chance to take the engine, had a right to go about his other business in the expectation that defendant's agents would use such precautions to prevent damage as were necessary, and that plaintiff was not negligent in failing to instruct them as to necessary precautions. *Underwood* v. *A. W. Stevens Co.*, 39.

4. The negligence relied upon being the propelling of the engine past plaintiff's buildings without the bonnet on the smokestack and with the damper open, the mere presence of plaintiff, and his knowledge that the bonnet was off and the damper open, when the engine was first moved, did not amount to contributory negligence on his part, unless he was in some way responsible for the absence of the bonnet, or had the danger in mind. *Id.*

5. There is no error in stating to the jury that plaintiff's claim was that he supposed that defendant's agents would put on the spark arrester and have the protection afforded by its use, though there is no direct testimony to that effect, where it is manifest from the evidence that he relied upon them to take the usual precautions, which would, according to the testimony, include the bonnet. *Id.*

6. A merchant who buys in the open market a stove polish which purports to be safe and proper for use, and sells the same for the purpose for which it is apparently intended, is not liable, in the absence of negligence, if it turn out that the polish is not adapted to the proposed use, but on the contrary is inflammable and explosive, and causes injury. *Clement* v. *Rommeck*, 595.

See MASTER AND SERVANT (5, 11, 14–19); RAILROADS (2, 3, 5, 6).

NEW TRIAL.

1. In an action of trespass for cutting timber, a new trial will not be granted, on the ground that the verdict is excessive and against the weight of the evidence, where it appears that defendant had full notice of plaintiff's claims, and, instead of keeping an account of the timber cut from plaintiff's land, intentionally mingled it with a large amount of other timber then being cut by defendant in carrying on extensive lumbering operations. *North Michigan Land & Live Stock Co.* v. *Kneeland*, 495.

2. A new trial will not be granted because of the absence of a witness whose testimony would have been merely cumulative on the question of damages, and whose intended absence was known to counsel, if not to the party, before the trial was proceeded with. *Id.*

3. Where, on a motion for a new trial, in an action of trespass for cutting timber, on the ground of excessiveness of the verdict,

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NEW TRIAL—Continued.

the trial court, after considering the affidavits filed in support of the motion, concludes that the verdict is excessive and orders a remittitur, a claim that he should have submitted the matter to another jury, instead of fixing the amount of damages, is not well taken, where the court did not find defendant excused for the failure to produce at the trial better evidence of the amount of timber cut. *Id.* 496.

4. A motion for a new trial on the ground of newly-discovered evidence showed that plaintiff made unsuccessful inquiries to discover the desired evidence and that he was misled concerning the testimony which one witness would give, in that upon close inquiry it was found he knew the facts only from hearsay. The witness was not sworn, the inference being that his want of knowledge was discovered before or during the trial. *Held*, that though the showing of diligence might have influenced the court to grant a continuance, and the showing of surprise might have secured an order permitting a voluntary nonsuit with leave to set the same aside, neither showing appeals to a court of review on an application to reverse an order denying a new trial. *Roberts* v. *First Nat. Bank of Yale*, 507.

5. Where the damages awarded in condemnation proceedings are inadequate, the remedy is a new trial, and the court cannot deny the landowner's motion for a new trial on that ground on condition that petitioner will submit to an increased award fixed by the court. *City of Grand Rapids* v. *Coit*, 668.

See SAVING QUESTIONS FOR REVIEW (4, 5).

NOTICE—See APPEAL AND ERROR (15); INSANE PERSONS; TAXATION (8); TIME.

OFFICERS.

Under section 18, article 4, of the Constitution, a member of the legislature of 1907, which enacted the law providing for the constitutional convention of 1907, is ineligible as a delegate to that convention, election as such delegate being a "civil appointment" from State authority as the quoted words are used in the section cited. *Fyfe* v. *Kent County Clerk*, 849.

See MUNICIPAL CORPORATIONS (1-4).

OPTIONS—See VENDOR AND PURCHASER (2, 3).

ORDINANCES—See MUNICIPAL CORPORATIONS (12).

PARENT AND CHILD.

Though a husband and wife on separating may make a contract for the care of their minor children which will be recognized as valid between themselves, such contract will not be sustained to the detriment of the child, whose interests are of the first consideration. *Carpenter* v. *Carpenter*, 138.

PARTIES—See JUDGES (4); REPLEVIN.

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PARTNERSHIP.

1. The action of all but one of the stockholders of a limited partnership association in transferring certain notes belonging to the association to one of themselves, in payment of an alleged indebtedness, does not bind the nonparticipating stockholder if there was in fact no indebtedness. *Jacobs* v. *Morgenthaler*, 1.

2. Where payments are shown to have been made by an individual to a limited partnership association, the absence of proof that such payments were made for the purchase of stock justifies an instruction that they made the payor a creditor of the company. *Id.*

3. A division of the assets of a limited partnership association among its stockholders, in proportion to the amounts paid in by them, is valid, there being no creditors, though the payments were made by the stockholders upon the understanding that they should take treasury stock for them. *Id.*

4. Evidence examined, and *held*, to show that certain payments made by a stockholder of a limited partnership association were advancements to it and not payments on account of treasury stock purchased by him. *Id.*

5. Evidence examined, and *held*, that there was an absence of proof of fraud in the sale of the property of a limited partnership association, and an arrangement to apply the notes received therefor upon the claim of a creditor stockholder. *Id.* 2.

6. In trover by the receiver of a limited partnership association against a stockholder for certain notes given in part payment for the property of the association, and distributed to the stockholders in payment of their claims against it, evidence is admissible to show that a sum sufficient to pay all outstanding debts of the concern, except such as were due the consenting stockholders, was set aside, and placed in the hands of the secretary for that purpose. *Id.*

7. Defendant is also entitled to show, by cross-examination of the receiver and the secretary, who is the principal creditor, that no action has been brought against other stockholders who received notes under similar circumstances. *Id.*

8. Defendant is also entitled to show the facts regarding the claim of the secretary, the principal claimant, and the conditions upon which, and the funds from which, it was to be paid. *Id.*

9. A contract by a limited partnership association to employ plaintiff for two years at a salary of $2,000 per year is void if not reduced to writing and signed by at least two managers, as provided by section 6083, 2 Comp. Laws. *Rhoades* v. *Malta Vita Pure Food Co.*, 285.

10. Where an incoming partner denies the liability of the firm for the debts of the original owner of the business, a part of which the latter has paid with assets of the firm, it is not error to instruct the jury that the fact that the incoming partner did not deny his liability on being informed that his part-

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PARTNERSHIP—Continued.

ner had signed the firm name to the note sued upon is not of itself a ratification or adoption of said note, but may be considered in determining whether he told his partner he might give the note, and that a verdict cannot be found against the incoming partner because he was careless in omitting to know what use his partner was making of the partnership funds. *Michigan Shoe Co.* v. *Paul*, 696.

See CARRIERS (5); EVIDENCE (18).

PAYMENT—See BANKS AND BANKING.

PERSONAL INJURIES—See MASTER AND SERVANT (1, 5, 7, 10–17); RAILROADS (1, 2); WITNESSES (2).

PHYSICIANS AND SURGEONS.

In an action against a surgeon for malpractice, evidence examined, and *held*, that there was none warranting the inference that plaintiff's disabled arm or crippled foot resulted from improper surgical treatment. *Neifert* v. *Hasley*, 282.

PLEADING.

1. Where, in an action against a corporation, the bill of particulars claims compensation for services rendered beginning with a certain time, evidence is not admissible which shows a subsequent contract to pay plaintiff for services previously rendered to defendant's predecessor in the business. *Rhoades* v. *Malta Vita Pure Food Co.*, 285.

2. Where, in an action by a joint maker of a note against his comaker, the bill of particulars charges that the joint obligation was discharged by the payment of the entire amount due, recovery by plaintiff of advances consisting in part of money and in part of property made under a compromise agreement whereby the holder of the joint obligation accepted less than its face value, cannot be complained of by defendant, being favorable to him. *Moffet* v. *Sebastian*, 451.

See FALSE IMPRISONMENT (1); LANDLORD AND TENANT (4); PRINCIPAL AND SURETY.

POLICE—See MUNICIPAL CORPORATIONS (5).

POST OFFICE—See CONTRACTS (4).

PRESUMPTIONS—See GIFTS.

PRINCIPAL AND AGENT.

1. A telegram from the chief officer of a Nevada lodge of Odd Fellows, addressed to defendant's wife, announcing the death of her father, was delivered to defendant, who authorized the telegraph operator to have the body shipped at his expense. The Michigan lodge, of which deceased was a member, on receipt of a similar telegram, sent a telegram to the Nevada lodge, without consulting defendant, guaranteeing the charges. On learning of the action of the lodge, before arrival of the body, defendant stated to members that the

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PRINCIPAL AND AGENT—Continued.

charges would be paid.' *Held*, that defendant ratified the unauthorized act of the lodge and made himself liable for the guaranteed charges. *Hillman* v. *Hulett*, 289.

2. Plaintiff, the undertaker, who prepared and shipped the body upon the order of the Nevada lodge, which in turn looked to the Michigan lodge, was justified in holding defendant responsible as the undisclosed principal for whom both the lodges acted. *Id.*

3. Where neither the manager of the Michigan branch of a life-insurance company nor the local superintendent of agents had authority to bind the company by a contract of employment of a solicitor, the company is not bound by such a contract made by them unless it has so held them out as having such authority as to induce the solicitor to rely upon it, and to estop the company from denying it. *Gore* v. *Canada Life Assurance Co.*, 562.

4. Possession by the manager of the Michigan branch of a life-insurance company of a single copy of a blank contract of agency, which the officers of the company testify they did not know he had and was not intended for use in Michigan, is not such a holding out of the manager as having authority to enter into such a contract on the company's behalf as to estop it from denying such authority. *Id.*

5. Where a life-insurance company placed its business in Michigan in the hands of an agent upon the basis of a commission, and their contract contemplated the maintenance of headquarters here, and the soliciting of business by such agent through agents appointed by him, the company to assume no obligation to such soliciting agents, the fact that the company required bonds from the soliciting agents was not an admission that it had other contract relations with them involving a promise to pay for their services rendered to the general agent. *Id.*

6. That under its contract with its Michigan agent the company placed a representative in the Michigan headquarters, who officiated as bookkeeper and custodian of the funds received which, under the contract, belonged to the company; and that in the books there kept and in the books kept at the home office a soliciting agent's name appears as credited with commissions due him and charged with payments, do not show a ratification of contract relations between the company and the soliciting agent, where the bookkeeping may be regarded as a necessary means of safeguarding the company's interests and maintaining the efficiency and economical administration of the branch in the interest of the agent and his solicitors as well as of the company. *Id.*

7. That a life-insurance company included plaintiff's name in the list of agents filed with the insurance commissioner pursuant to section 7246, 2 Comp. Laws, does not show a ratification of an unauthorized contract by the company's agent obligating the company to pay plaintiff's commissions on business secured for the agent by him. *Id.* 563.

See BANKS AND BANKING; MORTGAGES (3).

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PRINCIPAL AND SURETY.

In an action by the indorser against the indorsee of a promissory note, a declaration alleging in the first count that defendant allowed a chattel mortgage securing the note to lapse, and in enforcing its judgment against plaintiff upon the note caused him great damage by levy upon his lands, and in the second count that defendant represented to plaintiff that the note had been paid, inducing plaintiff to give no further attention to the mortgage security but to allow it to lapse, resulting likewise in damage from defendant's levy, sets out no cause of action based on the duty of the defendant to enforce the mortgage security for plaintiff's benefit. *Roberts* v. *First Nat. Bank of Yale*, 507.

PRIVATE ROADS—See EMINENT DOMAIN (1).

PROBATE COURTS—See COURTS (2).

PROCESS.

The filing of an amended return of service of a writ of attachment does not have the effect of entirely superseding the original return unless so intended, and jurisdictional averments in the original will be given effect though not repeated in the amended return. *Pepin* v. *Nault*, 180.

See LOGS AND LOGGING; TIME.

PROMOTERS—See CORPORATIONS (3, 6).

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (13).

PUBLIC POLICY—See CONTRACTS (1, 4).

QUIETING TITLE.

1. One must have either a legal or an equitable title if he is to be allowed relief upon a bill to quiet title, though an equitable title is sufficient. (Section 448, 1 Comp. Laws.) *Horton* v. *Helmholtz*, 227.

2. Where a deed of State tax land executed by the auditor general was void because of insufficient payment therefore, and the original owner tendered a sufficient sum to the auditor general and demanded a deed, which was refused him, he acquired a sufficient equitable title to entitle him to relief by a bill to quiet title, though he did not move against the auditor general by mandamus to compel him to issue the deed. *Id.*

3. The auditor general is a proper party to such a bill. *Id.* 228.

4. On a bill to quiet title, filed under section 448, 1 Comp. Laws, evidence examined, and *held*, to clearly show that defendant was not out of possession of the land in controversy, and that to settle the rights of the parties ejectment should have been brought. *Tinker* v. *Piper*, 335.

QUO WARRANTO.

The procedure prescribed in quo warranto cases brought under

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QUO WARRANTO—Continued.

sections 9966 and 9967, 3 Comp. Laws, is not applicable to cases in which the attorney general asks this court, or a justice thereof, for leave to file an information against a corporation under section 9951, 3 Comp. Laws, and the court, or a justice thereof, may, in its discretion, grant such leave without notice to the respondent, and without any further showing than the facts set up in the verified information. *People, ex rel. Attorney General*, v. *Detroit, etc., R. Co.*, 122.

See ABATEMENT AND REVIVAL.

RAILROADS.

1. In an action against a railroad company for injury to a servant of a lumber company by moving without warning a car into which he was loading lumber, evidence examined, and *held*, to be a question for the jury whether plaintiff was negligent in pursuing his labor in reliance on receiving a customary warning from defendant's servants. *Fitzpatrick* v. *Michigan Cent. R. Co.*, 194.

2. Where a railroad company's servants were required by its rules to give warning to persons working about cars before moving them, and it was customary to do so, a failure to give the customary warning before moving the cars was negligence. *Id.*

3. When, in an action against a railroad company for negligent fire set by its locomotive, defendant establishes by reputable and uncontroverted evidence that its appliances were such as good railroading requires, that they were in the condition required by law, and properly managed, the statute (section 6295, 2 Comp. Laws) does not require the question of negligence to be submitted to the jury, but the question is one of law for the court. *Dolph* v. *Lake Shore, etc., R. Co.*, 278.

4. In an action against a railroad company for damages caused by fire alleged to have been set by its locomotive, evidence examined, and *held*, circumstantially sufficient to go to the jury on the issue whether defendant's locomotive set the fire, there being proximity of time and place. *Clark* v. *Grand Trunk Western R. Co.*, 400.

5. In an action against a railroad company for damages caused by fire set by its locomotive, testimony for defendant to the effect that the locomotive was properly equipped and managed, if uncontradicted, is conclusive, under section 6295, 2 Comp. Laws, and is not to be measured against an alleged presumption of improper equipment or of improper management arising upon the fact that the locomotive set the fire. *Id.*

6. Where a fire hose is necessarily laid across a railroad track for the purpose of extinguishing a fire, and trainmen, with warning of the presence of the hose, unnecessarily run upon and out it, the railroad company is liable for the property destroyed in consequence of the delay in procuring water caused by that act; but the company's servants are not chargeable with negligence in not looking for and discovering the

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RAILROADS—Continued.

hose, and an instruction which bases liability on constructive knowledge of the presence of the hose is erroneous. *Id.*

7. Where the purpose for which a railroad was constructed and is operated is that of a steam railroad, to carry frieght to and from manufactories and business houses not otherwise accessible by the steam railroads, the facts that the company owning it was organized under the train railway act (chapter 167, 2 Comp. Laws), and that the track is laid along a highway, do not make its use that of a street railway, the company having been reorganized under the general railroad law, and its property having been leased to a steam railroad company. *City of Detroit* v. *Detroit Manufacturers' Railroad*, 530.

8. The property of the Detroit Manufacturers' Railroad, a corporation organized under the general railroad law, is assessable by the State board of assessors, under Act No. 178, Pub. Acts 1901, and not by the local taxing officers of the city of Detroit, though the road is laid along a street of the city, and was built by a company organized under the train railway act. *Id.* 531.

See EMINENT DOMAIN (1).

RAPE—See CRIMINAL LAW (2); INDICTMENT AND INFORMATION.

RECEIVERS.

1. That the attorney of the creditors of a mutual insurance company in the hands of a receiver procured the resignation of the receiver, procured the consent of another person to act as receiver, induced the commissioner of insurance to petition for his appointment, and since his appointment has acted as the attorney for the new receiver, and as such procured the transfer of the proceedings to the county in which the receiver and attorney reside, the judge of the county in which the proceedings were instituted being disqualified, does not justify the vacation of the orders by which the results recited were accomplished, there being no understanding that the new receiver should favor the creditors or be otherwise unfaithful to his duties. *Daniel* v. *Citizens' Mut. Fire-Ins. Co. of Jackson*, 626.

2. There is no impropriety in the employment by a receiver of the same attorney employed by the creditors unless there is a conflict of interests, in which case the remedy is by employment by the receiver of another attorney. *Id.* 627.

3. Excessiveness of an assessment by a receiver is no ground for a bill of review, the remedy by vacating it, or by securing a proper distribution of the fund raised, being adequate. *Id.*

See EQUITY (3); VENUE.

RECOUPMENT—See MECHANICS' LIENS (2).

REHEARING—See APPEAL AND ERROR (14, 15).

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RELIGIOUS SOCIETIES.

1. Moneys accumulated by a voluntary unincorporated club composed of parishioners of a Roman Catholic church, not accumulated for general church purposes, but obtained either for the specific purpose of building a new church, or such other specific church purpose as the membership of the club should determine upon, do not belong to the bishop of the diocese, nor to the church, nor are they subject to their control. *Eis* v. *Croze*, 62.

2. A voluntary committee of men parishioners of a Roman Catholic church purchased a parcel of land for the purpose of providing a site for a new church building and took the title in the name of one of themselves, who executed a declaration of trust providing for the transfer of the property to the bishop of the diocese on payment by or for the church within three years of the money advanced. A club of the women parishioners contributed funds not belonging to or under the control of the church or of the bishop on the agreement that they were to have a half interest in the property, subject to the terms of the declaration of trust. The church declined the offer of a site and built elsewhere. *Held*, that the bishop could predicate no rights to the men's half interest in the property on the action of the women's club. *Id.*

REPLEVIN.

In replevin by the buyer of timber of one who held it under a contract of conditional sale, against the assignee of the owner of the land from which it was cut and who had sold it under said contract, other parties claiming interests in the estate of the assignor are merely nominal parties whose interests cannot be litigated in the suit. *Van Buren* v. *Stubbings*, 206.

RESCISSION—See CONTRACTS (8); VENDOR AND PURCHASER (1).

RES JUDICATA—See JUDGMENT (1–4).

REVIEW, BILL OF—See JUDGMENT (6).

SAGINAW COUNTY—See JUDGES (5).

SALES.

1. Where, in an action on the common counts for goods sold and delivered, defendant gives notice of recoupment, alleging that the goods were delivered under an agreement that plaintiff was to deliver a larger quantity, which he did not do, the issue to be tried is: What was the contract? and the onus of proving his contract is upon the plaintiff. *Drake Coal Co.* v. *Croze*, 60.

2. In an action for the price of railroad ties sold and delivered, evidence examined, and *held*, sufficient to go to the jury on the issue whether a claimed inspection was such as the contract of sale provided. *Lehigh* v. *Standard Tie Co.*, 102.

3. A contract of sale of standing timber under which the title is to remain in the seller and the lumber not to be removed from the place of manufacture until the purchase price is paid is a contract of conditional sale. *Van Buren* v. *Stubbings*, 206.

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SALES—Continued.

4. Where the contract of conditional sale under which a person holds possession of standing timber is expressly referred to in the contract by which he sells it to another, no other notice of the terms of the original contract is necessary, and the original owner's title cannot be defeated except by a waiver upon which the subsequent purchaser has acted to his injury. *Id.*

5. An agent solicited an order for goods of defendant, but defendant declined to buy, stating that if he afterwards concluded to order he would send direct to the principal. Subsequently he sent a telegram to the principal accepting the agent's offer and alluding to a letter to follow, which he sent, containing all the essential terms of a contract. *Held*, that oral representations of the agent, not incorporated in the letter, were not binding on the principal. *McCaskey Register Co.* v. *Truettner*, 241.

6. Testimony by plaintiff, in support of his bill of particulars stating the items and price of goods furnished to defendant, that he furnished such items, and "charged" the affixed price therefor, is sufficient, in the absence of specific objection during the taking of the testimony, to support a finding that the value of the goods was as claimed. *Hillman* v. *Hulett*, 289.

7. Where a seller of goods for resale fails to perform his contract as to furnishing advertising matter and other aid to making sales, and such failure to perform is not waived, the measure of his damages in an action for the price is the contract price, less such amount of damages as the buyer can show he has suffered by reason of the seller's default. *Simpson* v. *Crane*, 352.

8. Where a buyer of goods receives precisely what he ordered he cannot recoup any damages on account of the inferior quality or efficacy of the goods. *Id.*

9. Defendant ordered of plaintiff ten cars of crushed stone, which plaintiff shipped consigned to himself, and ordered the carrier to deliver to defendant. The cars were placed at defendant's order and after several days defendant learned that the stone was not suitable for the purpose for which he ordered it, and canceled the order. Plaintiff reshipped the stone to his place of business and sued for the price. *Held*, that on delivery of the stone, which conformed to the contract of sale, to defendant, the title passed to him, and that plaintiff had a right to retain the property for defendant and sue for the contract price and the necessary expense of removing same from defendant's custody. *Meagher* v. *Cowing*, 416.

10. Where a contract for the sale of goods is entered into by means of an order for the same and an unconditional acceptance thereof, subsequent correspondence between the parties concerning payment, and relative to the buyer's credit, no agreement being reached, is ineffectual to modify the contract so as to relieve the seller of the duty of shipping all the goods as agreed. *Talcott* v. *Freedman*, 577.

11. The construction of letters depended upon to modify a contract

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SALES—Continued.

is a question of law for the court and it is error to submit the same to the jury. *Id.*

12. The measure of damages for failure to supply goods procurable in the open market is the additional cost to the buyer; but, if the goods are not obtainable, the buyer is entitled to recover the profits lost through the fault of the seller. *Id.*

13. In an action for damages for failure to supply goods as agreed, the buyer is entitled to show what efforts he made to procure the goods in the open market, by correspondence and otherwise. *Id.*

14. In an action for damages for failure to supply goods as agreed, evidence as to a fire which occurred in the buyer's store several months after the transaction is immaterial, and it is erroneous and prejudicial for the court to refer to it in the charge as an "important factor" in the termination of the buyer's business. *Id.*

See CONTRACTS (7); EVIDENCE (5); FRAUDULENT CONVEYANCES; NEGLIGENCE (6).

SALES IN BULK—See FRAUDULENT CONVEYANCES.

SAVING QUESTIONS FOR REVIEW.

1. An objection on the ground of variance between the declaration and proof must be made in the trial court. *Van Cleve* v. *Radford*, 106.

2. Assignments of error based upon the argument of counsel will not be reviewed where the record does not show that objection was made at the time and ruled upon by the court. *Pierson* v. *Illinois Cent. R. Co.*, 167.

3. An admission by counsel, in answer to a question put by the court, that the testimony did not show negligence in a certain particular, evidence offered on that theory having been excluded, and failure to object to the statement in the charge that plaintiff withdrew any claim of negligence in that behalf, do not estop plaintiff from relying in this court on the exceptions taken to the exclusion of the evidence offered in support of that theory, it not being clear that counsel did not misunderstand the position of the court in stating his theory of the case. *Kaess* v. *Tivoli Brewing Co.*, 371.

4. Error in denying a motion for a new trial cannot be reviewed in the absence of an exception to such denial. *Moffet* v. *Sebastian*, 451.

5. Where the attorney who tried a case was disconcerted by a prompt ruling of the court, and inadvertently failed to except, and out of diffidence neglected to offer testimony which he might otherwise have offered, the matter should have been brought to the attention of the trial court by motion for a new trial in order to secure review in this court. *North Michigan Land & Live Stock Co.* v. *Kneeland*, 495.

SERVICE—See TAXATION (8).

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SET-OFF AND RECOUPMENT—See MECHANICS' LIENS (2, 4).

SPECIAL ASSESSMENTS—See MUNICIPAL CORPORATIONS (13).

SPECIFIC PERFORMANCE.

1. Equity will not permit a party to resist specific performance of a contract to convey land by electing to pay the penalty stipulated therein. *Powell* v. *Dwyer*, 141.

2. A claim that affirmance of a decree for specific performance of a contract to convey land should be without costs, on the ground that the deed tendered by complainant for execution did not conform to the contract, is untenable where defendant did not decline performance on that ground, but on the ground, maintained to the last, that he had a right to decline performance on paying the penalty provided in the contract. *Id.*

3. On a bill for specific performance of an oral contract to convey land in consideration of complainant's agreement to move upon one of the parcels of land involved and furnish board and lodging for defendants' testator, evidence examined, and *held*, not to show the making of the alleged agreement. *Gillett* v. *Maser*, 517.

4. Specific performance of a parol contract to devise land will not be granted, though a will was executed in pursuance of the contract and has been denied probate on the ground of implied revocation by marriage and birth of issue, where complainant has done nothing by way of performance except to pay the agreed consideration. *Grindling* v. *Rehyl*, 641.

STATE LEGISLATURE.

A resolution of the legislature requiring the secretary of State to take the necessary steps to submit to the electors of the State a question to be voted upon at a special election called for another purpose is legislation which might be accomplished by bill or joint resolution and therefore requires the votes of a majority of all the members elected to each house (Const. art. 4, § 19), notwithstanding it is denominated a "concurrent" resolution by the legislature. *Kelley* v. *Secretary of State*, 343.

See CONSTITUTIONAL LAW (1); OFFICERS; STATUTES (2).

STATE TAX COMMISSION—See TAXATION (5).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF; SPECIFIC PERFORMANCE (4).

STATUTES.

1. Repeals by implication are not favored. *Whitmore* v. *Ionia Probate Judge*, 192.

2. Section 19 of article 4 of the Constitution requires that at least 17 senators must concur in passing a bill or joint resolution before it can become a law; section 14 of article 5, empowering the lieutenant governor to give the casting vote in cases of an equal division of the senate, being applicable only to

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STATUTES—Continued.

resolutions not having the force of laws, assuming that there are such. *Kelley* v. *Secretary of State*, 343.

3. Act No. 211, Pub. Acts 1907, appropriates "one hundred seventy-five thousand dollars" for the purpose of establishing a binder-twine plant at the State prison: "*Provided*, that of the one hundred seventy-five [thousand] dollars so appropriated, fifty thousand dollars is" appropriated for a certain purpose, "and the remaining sum of one hundred twenty-five thousand dollars is" appropriated for a certain other purpose germane to the purpose of the bill. The word "thousand" in brackets did not appear in the enrolled act as signed by the governor, though it did in the bill as passed by the legislature. *Held*, that the omission of the bracketed word was a mere clerical error which corrects itself and leaves nothing doubtful, and that the act is therefore valid. *Board of Control of the Michigan State Prison* v. *Auditor General*, 386.

4. Where a statute adopted from another State requires aid from the common law, the judicial interpretation of the statute, given by the courts of that State, does not bind the courts of this State to the extent of determining the rule of common law applicable to the statute. *Bliss* v. *Caille Brothers Co.*, 601.

5. Act No. 133, Pub. Acts 1905, purporting to amend section 6446, 2 Comp. Laws, and conferring the power of eminent domain upon street railroad companies, did not repeal Act No. 101 of the same session, which purported to amend the same compiler's section and contained a proviso limiting the manner in which municipalities could authorize street railroads to cross streets, highways, or other railways, not contained in said Act No. 133; the two acts not being inconsistent, and the later act making no reference to the earlier one. *Detroit United Ry.* v. *Barnes Paper Co.*, 675.

See DRAINS (1); ELECTIONS (1).

STREET RAILROADS—See RAILROADS (7, 8); STATUTES (5).

STRIKES—See INJUNCTION.

SUBROGATION—See CORPORATIONS (7).

SUBSCRIPTIONS.

1. A contract, by which certain citizens of a village agree to pay plaintiffs a stipulated sum of money as a voluntary aid in the construction of an electric lighting plant and flouring mill in the village in which such citizens reside, is not clearly illegal on its face. *Sutton* v. *Rann*, 35.

2. In an action upon a contract by which defendants, citizens of a village, agreed to pay plaintiffs a stipulated sum of money as a voluntary aid in the construction of an electric lighting plant and flouring mill in the village, evidence examined, and *held*, to clearly show that defendants were, and were understood to be, a mere committee through which the parties attempted to convey a bonus from the village to plaintiffs, and that no consideration was paid or promised them for their apparent undertaking. *Id.*

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TAXATION.

1. A valid sale to the State for taxes divests the original owner of all title to the land sold and vests a complete and perfect title in the State. *Horton* v. *Helmholtz*, 227.

2. A quitclaim by the original owner of lands previously bid in to the State at a valid tax sale conveys nothing. *Id.*

3. Where a deed of State tax land executed by the auditor general was void because of insufficient payment therefor, but the holder also holds under other tax sales and deeds made subsequent thereto, the later deeds are not void because of the failure to pay the deficiency on the prior sale, but the title conveyed by the later deeds is valid subject to a reassessment for the deficiency. *Id.* 228.

4. Mortgages, notes, and land contracts, representing property situated in Michigan, owned by and in actual possession of a nonresident at the time of his death in another State, are subject to the succession tax imposed by Act No. 195, Pub. Acts 1903, since collection of the debts secured upon land cannot be enforced, nor the estate properly administered and closed, without the aid of the laws of this State. *In re Rogers' Estate*, 305.

5. Where the notice of general and special review, published by the State tax commission under Act No. 154, Pub. Acts 1899, fixed September 28th as the time of the review, and the certificate made October 10th states that the review was had September 28th and 30th and on October 8th and 10th, and both the certificate and the record of the proceedings of the board are silent as to adjournments, the certificate is insufficient for uncertainty, and increased assessments based thereon are void as to the increase, since it cannot be presumed that the review certified to have occurred October 10th was under the notice for September 28th. *Delray Land Co.* v. *Township of Springwells*, 397.

6. Testimony by the presiding officer of the board and the minutes of an unofficial stenographer, transcribed long after the record of the action of the board was made, to the effect that at the close of each day's proceedings an adjournment was publicly announced to the date of the next session, will not serve to validate the certificate and record, in which no adjournments are shown, since such a holding would be permitting the levy and assessment of taxes to be founded upon parol. *Id.*

7. By accepting from the holder of the original title to lands the amount of the tax, together with the 100 per cent. and costs, and deeding the land to him, a tax title holder waives his right to raise the question whether the holder had a right to redeem on account of the deeds under which he claims not being recorded. *Holmes* v. *Loud*, 410.

8. Sections 140, 141, and 142 of the general tax law (1 Comp. Laws, §§ 3959, 3960, 3961) are to be construed together, and the periods of six months mentioned in each of them are co-

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TAXATION—Continued.

terminous, whence it follows that under section 142 a tax title purchaser is not entitled to possession until six months after the *return* of service of the notice to redeem provided by section 140, and a purchaser entering before the expiration of that period is a trespasser. *Id.*

See MUNICIPAL CORPORATIONS (15); QUIETING TITLE (2, 3); RAILROADS (7, 8).

TIME.

The rule that fractions of a day are not recognized in law, and that in computing the time for service of process the day of issuance is excluded and the day of appearance included, does not apply to notices measured by hours. *In re Schnapka*, 309.

See APPEAL AND ERROR (7); TAXATION (8).

TORTS—See ELECTION OF REMEDIES.

TOWNSHIP TREASURER—See EQUITY (2).

TRADES UNIONS—See INJUNCTION.

TRESPASS.

Error in instructions on the liability of defendant for treble damages for cutting timber is harmless, where the jury relieve the defendant from liability beyond single damages. *North Michigan Land & Live Stock Co.* v. *Kneeland*, 496.

See ASSIGNMENTS.

TRIAL.

1. The receipt, over objection and exception, of immaterial evidence, which is stricken out as soon as its immateriality develops, is not erroneous where no request is made for an instruction upon the matter. *Pierson* v. *Illinois Cent. R. Co.*, 167.

2. In an action against a railroad company for negligent fire, arguments of plaintiff's counsel to the effect that defendant's witnesses are not to be believed because defendant is a railroad company are prejudicial and warrant setting aside a verdict for plaintiff. *Dolph* v. *Lake Shore, etc., R. Co.*, 278.

3. Where plaintiff's counsel, in his argument to the jury, commented upon the wealth, character, and influence of defendants, charged witnesses with holding appointments secured by defendants and with being under defendants' influence and not daring to testify against them, charged defendants and their employés with coercing a witness with a political job to win, and made many other statements of a like character, the judgment will be reversed. *Holmes* v. *Loud*, 410.

4. Improper conduct and argument of counsel cannot be complained of by counsel equally at fault, the court having rebuked both during the trial and instructed the jury not to consider the prejudicial statements. *Brown* v. *Evans*, 430.

5. Where, after a ruling that there is no basis for the damages

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TRIAL—Continued.

claimed by the first two counts of a declaration, plaintiff abandons the remaining count, the ruling disposes of the case and a verdict for defendant is properly directed. *Roberts* v. *First Nat. Bank of Yale*, 507.

See MASTER AND SERVANT (11).

TRUSTS — See EVIDENCE (3); RELIGIOUS SOCIETIES (2); WILLS (13, 14).

UNITED STATES—See ADVERSE POSSESSION.

VARIANCE—See PLEADING (2).

VENDOR AND PURCHASER.

1. Where, on a bill to rescind a contract for the sale of land on the ground of fraudulent representations, it appears that at the time defendant entered into the contract to sell to plaintiff he had already made a binding contract to sell to another, of which fact complainant was not apprised until after the filing of his bill for rescission, a decree granting rescission will be affirmed though the making of the contract was not induced by the fraudulent representations. *Ransier* v. *Dwyer*, 487.

2. A writing executed by a landowner giving an option to purchase land on or before a certain date, and stating that when the balance of the purchase price "is paid a warranty deed of said property is to be given and an abstract to date of transfer furnished showing perfect title, also a tax history is to be furnished," only entitles the purchaser to a deed, abstract, and tax history on payment of the price within the time limited; and where the holder of the option neither accepts it in writing or tenders the price within the time limited his right is lost, although he demands the deed, etc., and states that payment will be made when satisfactory title is furnished. *Cameron* v. *Shumway*, 634.

3. An option is a contract by which the owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a limited time, and the other party acquires neither an interest in the land, nor a chose in action, prior to his election to purchase within the time limited. *Id.*

See CORPORATIONS (10); DRAINS (3); FRAUDS, STATUTE OF (3); SPECIFIC PERFORMANCE (1, 3).

VENUE.

Where a transfer of receivership proceedings to another circuit was necessary because of the disqualification of the judge of the circuit in which they were begun, the fact that the judge called to preside transferred them to his own circuit does not show any impropriety, where the selection was not improper or prejudicial to any party, it is not claimed that the judge was a party to any collusive arrangement, and no improper means were used to induce the selection. *Daniel* v. *Citizens' Mut. Fire-Ins. Co. of Jackson*, 626.

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VOTING MACHINES—See ELECTIONS (1, 2, 4).

WAIVER—See INSURANCE (2, 5, 6).

WILLS.

1. In proceedings to probate a will, contested on the ground that testator's belief in the illegitimacy of his son was an insane delusion, evidence examined, and *held*, that there was some evidence that testator's belief in contestant's illegitimacy which influenced the making of the will was produced by spiritualistic communications. *O'Dell* v. *Goff*, 152.

2. A deposition filed in a suit for divorce, brought by testator in another State against contestant's mother, in which the witness testifies to her infidelity before contestant was born, is admissible to prove that testator had good grounds to doubt the paternity of his child, there being a presumption that testator knew what the deposition contained. *Id.*

3. A belief in spiritualism, like belief in any other form of religion, affords no evidence of insanity. *Id.*

4. A will made in consequence of a monomania, produced by testator's thinking so continually and persistently upon the subject of spiritualism as to be incapable of reasoning where that subject is concerned, is void for lack of testamentary capacity. *Id.*

5. A will made in consequence of such extraordinary confidence in spiritualistic communications that testator was impelled to follow them blindly and implicitly is not testator's will, and is not admissible to probate, and it is immaterial whether this conclusion rests upon the ground of absence of testamentary capacity or upon the ground of undue influence. *Id.* 153.

6. In proceedings to probate a will, evidence examined, and *held*, that there was evidence that testator was a monomaniac upon the subject of spiritualism, that in making his will he was influenced by spiritualistic communications which he was incapable of resisting, and that there was therefore evidence of undue influence. *Id.*

7. In proceedings to probate a will, contested on the ground of incapacity and undue influence induced by monomania on the subject of spiritualism, the truth or falsity of the spiritualistic faith is not in issue, and witnesses should not be permitted to testify that testator was a monomaniac merely because he believed in spiritualism. *Id.*

8. Refusal to permit proponents to prove by one who was duly qualified that there was nothing irrational from the standpoint of a spiritualist in testator's belief that a medium in a trance might do him harm was error, since such testimony would tend to remove from the minds of the jury the impression which might otherwise exist that the particular belief was evidence of insanity. *Id.*

9. A witness for contestant, who had testified to lack of testamentary capacity, could not be cross-examined upon the subject of other religions and their effect on testamentary capacity. *Id.*

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WILLS—Continued.

10. It was discretionary with the court to refuse to compel one of contestant's witnesses to state upon cross-examination which of several circumstances indicating insanity was, in his judgment, the most significant. *Id.*

11. Whether evidence of contestant's resemblance of testator was competent will not be decided upon a record that conclusively establishes paternity in testator, that being the only issue to which the testimony was applicable. *Id.* 154.

12. Declarations of testator tending to prove lack of testamentary capacity made after the making of the will are admissible. *Id.*

13. Where it is claimed that a will bequeaths the residuum of a trust estate to the trustee, who was also the scrivener who drew the will, and was a lawyer familiar with the phrases and language commonly used to create a devise or bequest, the circumstances not only invite great circumspection, but authorize the court to construe the provision as unfavorably to the claim of the trustee as the language used will permit. *Abrey* v. *Duffield*, 248.

14. Where a will bequeaths a fund to the scrivener in trust, and provides that in case any remainder be left after execution of the trust "he shall appropriate the same to the defraying of the expenses of this trust, or in such other or different manner as he may deem best," the trustee does not take the residuum personally, but the clause should be construed as directing the trustee to devote the remainder of the trust fund to some undefined purpose apart from an individual use, and the clause being inoperative for vagueness and uncertainty, the residuum passes to the heirs as intestate property. *Id.*

15. On a bill by an executrix and legatee against her co-executor to cancel a contract between them by which the entire management of the estate was to be given to defendant and complainant was to accept a specified sum per year in lieu of the provision for her support contained in the will, evidence examined, and *held*, that complainant failed entirely to support her contention that she was deceived or misled or did not understand the contract when she signed it. *Hull* v. *Hull*, 500.

16. A will provided that testator's widow should receive the entire income of the estate and such further sum from the principal as should be agreed upon by the executors or ordered by the court, as her necessities might require, and appointed the widow and a nephew executrix and executor. By a contract consented to in writing by all others interested in the estate, it was agreed that the executrix should have a stipulated sum annually and an additional allowance if her necessities required it in lieu of the provision for her support contained in the will, and that the executor should have the entire management of the estate. *Held*, that the contract was a fair contract, and that it was competent for the parties to enter into it. *Id.*

17. The provision for an additional allowance, in case her "actual

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WILLS—Continued.

necessities" should require it, has reference to the necessities for support and comfort provided for in the will, and does not invalidate the agreement as depriving the legatee of rights given her by the will. *Id.*

18. A divorce and settlement of their property rights between husband and wife operates ipso facto to revoke his will previously made, and no subsequent act of the testator not accompanied by the solemnities requisite for the making of a valid will will revive it. *Wirth* v. *Wirth*, 687.

See SPECIFIC PERFORMANCE (4).

WITNESSES.

1. Where a witness has recently changed his domicile, evidence as to his reputation for truth and veracity at his previous places of residence is admissible within reasonable limits as to time. *People* v. *Mix*, 260.

2. Where plaintiff, in a personal injury case, is obliged to call defendant's engineer to make his case, counsel should be permitted to put leading questions to him and introduce his contradictory statements. *Kaess* v. *Tivoli Brewing Co.*, 371.

3. Where, in an action against a saloon keeper and his bondsmen for an unlawful sale made by one to whom it is claimed the saloon was sold and a power of attorney given as a mere sham to facilitate conducting the business under the seller's license, the court ordered the alleged buyer to produce the power of attorney, a claim that he was thereby compelled to incriminate himself is untenable, as the only bearing the power of attorney would have in case he were informed against for running a saloon without a license would be to furnish evidence of his innocence. *Hilliker* v. *Farr*, 445.

See EXAMINATION OF WITNESSES; EXECUTORS AND ADMINISTRATORS (8); WILLS (9, 10).

WRIT OF ERROR—See APPEAL AND ERROR (18).

Ex. J. C. F. 2/4/08.

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